IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
Appellant,

v.

THE NEW YORK STATE HUMAN RIGHTS APPEAL BOARD and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Appellees.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the application of New York's Human Rights Law, N.Y. Exec. Law § 296.1 (McKinney 1972 & Supp. 1980-81) ("HRL") to require a modification of Appellant's maternity leave policy for flight attendants—a policy maintained in compliance with federal safety requirements—encroaches upon a regulatory field occupied and preempted for exclusive federal control?

2. Whether the application of New York's HRL to require a modification of Appellant's maternity leave policy for flight attendants conflicts with Appellant's federal duty to conduct its operations with the highest possible degree of safety in violation of the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2?

3. Whether the application of New York's HRL to require a modification of Appellant's maternity leave policy for flight attendants places an intolerable burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3?

4. Whether Appellant has been denied due process of law in violation of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, by Appellees' refusal to decide this case on the basis of the evidence adduced at the hearing and Appellees' failure to consider, address or decide any of Appellant's federal constitutional claims?

PARTIES

The parties to this appeal are Trans World Airlines, Inc.,* as Appellant, and the New York State Human Rights Appeal Board and the New York State Division of Human Rights, as Appellees.

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* Pursuant to Sup. Ct. Rule 28.1, the following is a list of all parents, affiliates, and subsidiaries of Appellant Trans World Airlines, Inc.: Canteen Corporation, Century 21 Real Estate Corporation, Hilton International Co., Spartan Food System, Inc., and Trans World Corporation.

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JURISDICTIONAL STATEMENT

Appellant, Trans World Airlines, Inc., hereby appeals from an order of the Court of Appeals of the State of New York [1] dismissing its appeal from an order of the Supreme Court of the State of New York, Appellate Division, First Department, affirming an order of the New York State Division of Human Rights, as affirmed by the New York State Human Rights Appeal Board, holding that Appellant's maternity leave policy for flight attendants violates section 296.1 of the New York Human Rights Law, N.Y. Exec. Law § 296.1 (McKinney 1972 & Supp. 1980-81), and requiring Appellant to substantially modify its policy.

OPINIONS BELOW

The orders of the Supreme Court of the State of New York, Appellate Division, First Department, the New York State Human Rights Appeal Board and the New York State Division of Human Rights are unpublished and appear respectively at pages A30-A31, A20-A21, and A13-A18 of the Appendix. The orders rendered by the Court of Appeals of the State of New York dismissing Appellant's appeal as of right from the order of the Appellate Division of the Supreme Court of the State of New York and denying Appellant's motion for reargument, or in the alternative for leave to appeal, are also unpublished and appear respectively at pages A33 and A46 of the Appendix.

JURISDICTION

These proceedings were commenced on December 14, 1973, with the filing of a complaint by the New York State Division of Human Rights (hereinafter the "Divi-

[1] TWA has been informed by the Court of Appeals that its order dismissing TWA's appeal as of right "upon the ground that no substantial constitutional question [was] directly involved," constituted a decision on the merits. Therefore, TWA believes that an appeal from the Court of Appeals is proper. *See Van Huffel v. Harkelrode*, 284 U.S. 225, 230 (1931). However, because there appears to be some uncertainty on the matter, TWA has filed a Notice of Appeal with both the Court of Appeals and the Supreme Court of the State of New York, Appellate Division, First Department.

sion"), as complainant, before the Division in its judicial capacity, against Trans World Airlines, Inc. (hereinafter "TWA"), alleging, *inter alia*,[2] that TWA's policy of requiring flight attendants to discontinue flying and begin a maternity leave of absence upon knowledge of pregnancy violates section 296.1 of the New York Human Rights Law, N.Y. Exec. Law § 296.1 (McKinney 1972 & Supp. 1980-81) ("HRL").

TWA moved to dismiss the case on the grounds that the Division lacked jurisdiction or authority to grant the relief sought in its Complaint in that the application of New York's HRL to require a modification of TWA's maternity leave policy (1) encroached upon a regulatory field occupied and preempted for exclusive federal control, (2) conflicted with TWA's federal duty to conduct its operations with the highest possible degree of safety in violation of the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, and (3) placed an intolerable burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, Const. art. I, § 8, cl. 3.[3]

The instant appeal is taken from an order of the Court of Appeals of the State of New York dismissing TWA's appeal from an order of the Supreme Court of the State of New York, Appellate Division, First Department, affiming an order of the New York State Division of Human Rights, as affirmed by the New York State Human Rights Appeal Board, holding that TWA's maternity leave policy for flight attendants violates New York's HRL and requiring TWA to substantially modify its policy.

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[2] *See* note 3 *infra* and accompanying text.

[3] TWA also maintained that inasmuch as its maternity leave policy was embodied in a collective bargaining agreement negotiated pursuant to federal law, the application of New York's HRL to require a modification of that policy was preempted by the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Other issues, not involved in this appeal, were also made the subject of TWA's motion. *See* note 4 *infra.*

A Notice of Appeal was timely filed on May 18, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. VI, cl. 2:

> *Supreme Law of Land*
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. I, § 8, cl. 3:

> *Regulation of Commerce*
>
> The Congress shall have power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. amend XIV, § 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.*, provides in pertinent part:

49 U.S.C. § 1302(a)(1), (2), (5) (Supp. IV. 1980):

> (a) In the exercise and performance of its powers and duties under this chapter, the [Civil Aeronautics] Board shall consider the following, among other

things, as being in the public interest, and in accordance with the public convenience and necessity:

(1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services and full evaluation of any report or recommendation submitted under section 1307 of this title.

(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public.

. . .

(5) The development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaption of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States, the Postal Service, and the national defense.

49 U.S.C. § 1303(a) (1976):

In the exercise and performance of his powers and duties under this chapter the Secretary of Transportation shall consider the following, among other things, as being in the public interest:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

49 U.S.C. § 1348(a), (c) (1976):

(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable

airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

. . .

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 U.S.C. § 1421(b):

(b) In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest.

49 U.S.C. § 1424(a), (b):

(a) The Administrator is empowered to issue air carrier operating certificates and to establish minimum safety standards for the operation of the air carrier to whom any such certificate is issued.

(b) Any person desiring to operate as an air carrier may file with the Administrator an application for an air carrier operating certificate. If the Administrator finds, after investigation, that such person is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this chapter and the rules, regulations, and standards prescribed thereunder, he shall issue an air carrier operating certificate to such person. Each air carrier operating certificate shall prescribe such terms, conditions, and limitations as are reasonably necessary to assure safety in air transportation, and shall specify the points to and from which, and

the Federal airways over which, such person is authorized to operate as an air carrier under an air carrier operating certificate.

N.Y. Exec. Law § 296.1 (McKinney 1972 & Supp. 1980-81):

1. It shall be an unlawful discriminatory practice:

(a) for an employer . . . because of the age, race, creed, color, national origin, sex or disability, or marital status of any individual . . . to discriminate against any such individual in compensation or in terms, conditions or privileges of employment.

STATEMENT OF THE CASE

This case has taken a long road from its beginning to what TWA will show to have been a predetermined end. While only a full briefing and plenary consideration of the case can reveal completely the degree to which the New York state agencies and courts have refused to even consider TWA's evidence and authorities, an outline of the proceedings to date should give the Court some idea of the unfair treatment to which Appellant has been subjected.

This case began on December 14, 1973, with the filing of a Complaint by the Division as complainant, with the Division as judge, alleging discrimination by TWA against its female employees (A1-A3). The Complaint was so vague and indefinite as to be essentially meaningless and TWA answered by filing a general denial. The Division took no action with respect to the case until a hearing was scheduled over three years later on March 30, 1977. Prior to the hearing, TWA determined, through discussions with the Division's counsel, that two of its policies were under attack:

(1) the non-payment of sick leave and disability benefits to female employees absent from work due to normal pregnancy;[4] and

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[4] The benefits issue is no longer a part of this case. By the time the Division ordered TWA to begin paying income maintenance benefits to employees absent from work due to normal pregnancy,

(2) the requirement that female flight attendants take an immediate leave of absence from flight duties upon knowledge of pregnancy.

Prior to the hearing, TWA timely filed an Amended Answer raising numerous defenses, including claims that the Division lacked jurisdiction to enforce New York's HRL in such a way as to alter TWA's maternity leave policy for flight attendants on three constitutional grounds. First, the Division's regulation of policy maintained by TWA solely for flight safety reasons encroached upon a regulatory field preempted and occupied for exclusive federal control. Second, the Division's construction of New York's HRL as requiring an abandonment of TWA's maternity leave policy conflicted with TWA's safety obligations under the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.* Third, the Division's construction of New York's HRL as requiring a modification of TWA's maternity leave policy placed an unconstitutional burden on interstate commerce (A4-A7).

At the opening of the hearing on March 30, 1977, TWA moved to dismiss the Complaint on the grounds mentioned above and filed a detailed memorandum in support of its motion. Consideration of the motion was deferred.[5]

TWA was already paying such benefits in compliance with the Pregnancy Disability Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) 1976). Because no back pay ordered the issue became moot for purposes of this case.

TWA continues to have an ongoing dispute with the Division concerning the time period prior to the effective date of the Pregnancy Disability Act. The Division is currently subject to an injunction issued by the United States District Court for the Southern District of New York barring it from attempting to require TWA and various co-plaintiffs to pay back pay for maternity benefits prior to the effective date of the Pregnancy Disability Act. *Delta Air Lines, Inc. v. Kramarsky*, 485 F. Supp. 300 (S.D.N.Y. 1980), *aff'd in part and rev'd in part on reh'g*, 666 F.2d 21 (2d Cir. 1981) *prob. juris. noted*, 102 S.Ct. 1968 (1982), *argued sub nom. Shaw v. Delta Air Lines, Inc.*, Jan. 10, 1983.

[5] Under the rules of the New York State Division of Human Rights, motions to dismiss are not heard until after the conclusion of the public hearing. Rules of Practice of the New York State Di-

The Division then presented its case, which consisted exclusively of the following three items:

(1) A copy of a 1973 contract between TWA and the union representing its flight attendants which embodied the two policies being challenged;

(2) A request that the hearing examiner take official notice of the record and decision in the case of *Rosenfeld v. United Air Lines, Inc.*, No. CS-32898-74, *decided* Sept. 10, 1975, *aff'd* App. Nos. 3558 and 3065, *confirmed sub. nom. United Air Lines, Inc. v. State Human Rights Appeal Board*, 61 A.D.2d 1010, 402 N.Y.S.2d 630 (1978), *appeal denied*, 44 N.Y.2d 648 (1978), *cert. denied*, 439 U.S. 982 (1978), in which the Division had ordered United Airlines to modify a similar maternity leave policy for flight attendants; and

(3) a transcript of the testimony of Dr. Andre Hellegers given in *Rosenfeld* on January 16, 1975.

The *Rosenfeld* case involved a claim of sex discrimination against United Airlines based on its rule requiring flight attendants to discontinue flight duties immediately upon knowledge of pregnancy. United's rule, like TWA's, applied only to flight personnel. Nonflight employees who became pregnant were allowed to work up to the point of delivery if they remained capable of performing their duties. Following a hearing before the Division, United was ordered to institute a new policy which, from the first through the twentieth (20th) week of a forty-week pregnancy prohibited United from disqualifying any female flight attendant from flight duties because of her pregnancy, leaving that decision entirely to the flight attendant and her personal physician. From the twentieth (20th) through the twenty-seventh (27th) week of pregnancy, flight attendants could be disqualified from flight duties for safety reasons on an individual basis. From

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vision of Human Rights § 465.10(e)(2), (3). No response was ever filed by the Division as complainant to TWA's motion and the portion of the motion addressed to the maternity leave issue was never discussed or considered by the Division in its judicial capacity.

the beginning of the twenty-eighth (28th) week through the completion of pregnancy, the Division ruled that safety considerations unique to the flight attendant position allowed United to impose a blanket rule requiring all pregnant flight attendants to cease flight duties.

The result in the *Rosenfeld* case was based exclusively on the testimony of Dr. Andre Hellegers. Dr. Hellegers was of the opinion that the condition of pregnancy would not significantly interfere with most flight attendants' performance of their duties. The Division accorded conclusive weight to Dr. Hellegers' opinion, despite his own admission that he was only "weakly" familiar with the duties of a flight attendant and had never been involved in or observed a real or simulated emergency evacuation of an aircraft. In this case, after introducing Dr. Hellegers' testimony from *Rosenfeld*, the Division rested.

For a period of nearly two years, TWA put on its case on the merits one or two days at a time. A great deal of TWA's evidence was uncontroverted[6] and showed that TWA maintains its mandatory maternity leave rule for flight attendants for one reason—because it has determined, based on sound medical advice, that there is a significant risk that a pregnant flight attendant may become incapacitated during flight due to unpredictable complications associated with the condition of pregnancy and be unable to perform her emergency duties. Based on this determination, and in recognition of its federal duty to operate with the highest possible degree of safety, TWA has decided that the safest policy for the protection of its passengers is to eliminate the risk of these unpredictable events by requiring pregnant flight attendants to cease flying at the first identifiable moment in pregnancy.[7]

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[6] In fact, the Division offered no rebuttal evidence of any kind.

[7] This point is important. The evidence adduced below was unquestioned and unrebutted that TWA's maternity leave policy for flight attendants is maintained solely for safety reasons. The Division did not argue and made no attempt to prove that these safety reasons are pretextual.

TWA presented six medical experts who testified in support of the reasonableness of its belief that the condition of pregnancy involves significant safety risks of an unpredictable nature. These witnesses were preeminent experts in the fields of obstetrics and gynecology, aerospace medicine, and fetal and maternal physiology and hematology. Unlike Dr. Hellegers, all of TWA's expert witnesses either had a working knowledge of the routine and emergency duties of flight attendants, or took it upon themselves to acquire this knowledge before giving their expert opinions. All testified that they considered TWA's policy to be reasonable, advisable, and the safest way to deal with flight attendant pregnancies.

On May 23, 1979, the hearing examiner issued his Recommended Findings of Fact, Decision and Order (A8-A12).[8] His "findings of fact" consisted of a single paragraph summarizing TWA's policies and failed to discuss any of the safety and medical testimony presented in the case. This total failure to discuss the evidence was explained quite succinctly in the section of the recommendation entitled "Opinion" in which the hearing examiner stated: "[t]he issues presented in this proceeding were considered and disposed of in *Rosenfeld v. United Airlines, Inc.*" (A10). Without discussing any of TWA's legal arguments concerning the mandatory maternity leave issue, the hearing examiner recommended that TWA be ordered to abandon its safety policy for pregnant flight attendants and adopt the policy ordered in the *Rosenfeld* case.

On June 27, 1979, the Commissioner of the New York State Division of Human Rights issued an order, which with minor exceptions, simply restated the "findings" of the hearing examiner (A13-A18). Like the hearing examiner, the Commissioner failed to discuss any of TWA's

[8] At the close of the evidence, the hearing examiner ordered the parties to file simultaneous post-hearing memoranda addressing the evidence and legal issues. Although TWA timely filed its memorandum, the Division, despite repeated extensions, never filed a memorandum.

evidence regarding the safety issue and based his decision solely on the testimony of Dr. Hellegers in the *Rosenfeld* case (A15). In addition, the Commissioner refused to consider TWA's motion to dismiss or rule on any of the constitutional issues raised therein.

On June 12, 1979, TWA appealed the Commissioner's order to the New York State Human Rights Appeal Board. In addition to the constitutional defenses raised before the Division, TWA maintained that it had not received its "day in court," that the Commissioner's order was predetermined, and that the entire proceeding before the Division was mere window dressing to disguise the Division's preconceived intent to parrot the result in *Rosenfeld*. Following oral argument, at which the Division failed to appear, the Appeal Board issued a form order affirming the Commissioner's order "in all respects." This order also failed to discuss any of the facts or legal issues in the case (A20-A21).

On April 13, 1981, TWA filed a timely appeal to the Supreme Court of the State of New York, Appellate Division, First Department. In its appeal TWA raised all issues raised below, including its constitutional challenges to the Division's jurisdiction and the Division's failure to comply with the fundamentals of due process. After full briefing, the Appellate Division issued a one-page order dated October 7, 1982, confirming the order of the Human Rights Appeal Board (A30-A31). The Appellate Division's order was rendered without opinion and contained absolutely no discussion of the evidence or legal issues.

On November 5, 1982, TWA appealed as of right to the Court of Appeals of the State of New York. The Court of Appeals dismissed the appeal, without opinion, on the ground that no substantial constitutional question was directly involved (A38). TWA's motion for reargument, or in the alternative for leave to take a discretionary appeal, was also denied, without opinion, on February 23, 1983 (A46).

TWA then timely filed this appeal.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

TWA is an interstate and international air carrier operating in the State of New York. The essence of its business is the safe transport of passengers in interstate and foreign commerce. *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1972). As an air carrier entrusted with the lives and well-being of its passengers, TWA has a recognized federal statutory duty to conduct its operations "with the highest possible degree of safety." 49 U.S.C. § 1421(b) (1976); *see also* 49 U.S.C. § 1424 (1976). This duty includes the obligation to employ at all times the most highly qualified persons in positions affecting the safety of its passengers. *Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. 413, 435 (N.D. Cal. 1977), *aff'd*, 649 F.2d 670 (9th Cir. 1980).

Every airline, court and administrative agency, including the Division, that has considered the alleged discriminatory impact of mandatory maternity leave policies for flight attendants has determined that at some point in pregnancy safety considerations require all pregnant attendants to discontinue flight duties. While there are disagreements as to when this point is reached, all agree that at some point a line must be drawn. In this case, the Division as prosecutor urged, and the Division as judge agreed, that the line should be drawn after the twenty-seventh (27th) week of pregnancy. From that point through the termination of pregnancy, the Division agreed that safety considerations justified a blanket rule prohibiting all pregnant flight attendants from continuing to fly (A15).

Courts which have considered sex discrimination challenges to maternity leave policies for flight attendants under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), have reached differing results.[9] In ev-

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[9] Compare *Harris v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Levin v. Delta Air Lines, Inc.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,905 (S.D. Tex. 1982); ***Air Line Pilots Association***

ery case, however, including the instant one, it has been acknowledged that any discriminatory impact on female flight attendants caused by a blanket mandatory maternity leave policy is justified *at some point in pregnancy* because of the federal requirement that interstate air carriers conduct their operations with the highest possible degree of safety.

It has been TWA's position throughout the course of these proceedings that a safety rule such as its maternity leave policy for flight attendants cannot be altered by a state law, such as New York's HRL, and that it may be altered, if at all, only on a nationwide basis pursuant to federal law. TWA has consistently maintained that the relief sought and ultimately granted by the Division in this case involved a construction and application of New York's HRL which is impermissible on at least three constitutional grounds.

As demonstrated more fully below, each of these challenges to the Division's jurisdiction presents substantial federal questions involving the construction and operation of the Supremacy Clause and Commerce Clause of the United States Constitution. In addition, the refusal of the New York state agencies and courts to consider, address or decide any of these issues or to reach a decision on the merits based on the evidence presented, operated to deny TWA a full, fair and impartial hearing in violation

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v. Western Air Lines, Inc., 23 Fair Empl. Prac. Cas. (BNA) 1042 (N.D. Cal. 1979); *Condit v. United Air Lines, Inc.*, 13 Fair Empl. Prac. Cas. (BNA) 689 (E.D. Va. 1976), *aff'd*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (upholding rule requiring maternity leave immediately upon knowledge of pregnancy as justified by the federal requirement that airlines conduct their operations with the highest possible degree of safety) with *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (upholding blanket rule requiring a forced leave after the thirteenth (13th) week of pregnancy); *In re National Airlines, Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977) (20-week rule); *Maclennan v. American Airlines, Inc.*, 440 F. Supp. 466 (E.D. Va. 1977) (26-week rule).

of the Due Process Clause of the Fourteenth Amendment. Under these circumstances, it is imperative that this Court note probable jurisdiction and decide the substantial constitutional issues ignored below.

A. Federal Regulation of the Field of Airline Safety Preempts New York's HRL Insofar As It Purports to Require a Modification of TWA's Maternity Leave Policy for Flight Attendants.

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, state action in a particular regulatory field is absolutely precluded if Congress has manifested an intent to preempt or occupy that field for exclusive federal control. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Cooley v. Board of Wardens*, 53 U.S. 299 (1851). Preemption may either be express or implied and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. at 525. Absent explicit preemptive language, a Congressional intent to supercede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. at 633-39; *Campbell v. Hussey*, 368 U.S. 297 (1961).

Each of these tests is more than satisfied with respect to the field of air safety. The dominance of the federal interest in the field is exemplified by section 1108(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C.

§ 1508(a) (1976), which declares that the United States possesses "complete and exclusive national sovereignty in the airspace of the United States." *See also Burbank v. Lockheed Air Terminals, Inc.*, 411 U.S. at 638-39; *World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division*, 578 F.2d 800, 803 (9th Cir. 1978). By its nature, air safety demands exclusive federal regulation in order to achieve national uniformity vital to the public interest. *See Burbank v. Lockheed Air Terminal*, 411 U.S. at 633; *see also Cooley v. Board of Wardens*, 53 U.S. 299 (1851).

Affirmance of the Division's order, however, would disrupt this uniformity, allowing states to broadly regulate air safety policies of interstate carriers under the rubric of state antidiscrimination laws or other aspects of the police power. In formulating safety policies and procedures, interstate airlines, such as TWA, would be subject to all of the requirements of New York law, and subject to further and possibly conflicting requirements imposed by the laws of other states. If New York and other states are allowed to regulate, directly or indirectly, the flight safety policies of interstate air carriers, the paramount federal interest in facilitating unencumbered interstate travel by maintaining uniform regulation of interstate carriers could never be realized.[10] *See Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

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[10] It is of no moment that New York intrudes indirectly, through an antidiscrimination law, rather than directly, through a statute entitled "air safety regulation." Regardless of the mode adopted, to allow a state to regulate in an area reserved for exclusive federal control would frustrate the vital federal interest in uniformity. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524-25 (1981); *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959).

The comprehensive and pervasive nature of the federal regulatory scheme also makes it clear that Congress intended to occupy the field of airline safety to the exclusion of state action. The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.*, and regulations promulgated thereunder, reflect a comprehensive plan for the regulation of interstate air transportation. Section 307 of the Act grants to the Federal Aviation Administration ("FAA") broad authority to regulate the use of navigable airspace "to insure the safety of aircraft and the efficient utilization of such airspace" and "for the protection of persons and property on the ground." 49 U.S.C. § 1348(a), (c) (1976). Section 601 of the Act charges the FAA with formulating safety standards and directs it to give full consideration to the duty resting upon air carriers to perform their services "with the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b) (1976); *see also* 49 U.S.C. §§ 1302(a)(1), (2), 1303(a), 1348(a), (c), 1424 (a), (b) (1976).

With respect to flight attendant performance, the FAA has pervasively exercised its regulatory authority. Although the FAA has not thus far required certification of the competency of flight attendants or expressly prescribed standards for pregnant flight attendants, its concern for flight attendant performance in emergency situations is manifested in numerous regulations. For example, the FAA requires commercial aircraft to carry a minimum number of well-trained and experienced flight attendants. 14 C.F.R. §§ 121.391, 121.433 (1982).[11] FAA

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[11] Flight attendant training programs must include, *inter alia*: (1) instruction in the operation of emergency equipment, including ditching and emergency evacuation equipment, 14 C.F.R. § 121.417(b)(2) (1982); (2) instruction in handling emergency situations, including decompression, fire, ditching and evacuation, hijacking and other unusual situations; and (3) the performance of emergency drills, including ditching, emergency evacuation, fire and smoke control, operation of emergency exits, use of evacuation

regulations also require air carriers: (1) to locate flight attendants near exits and distribute them in the aircraft in order to provide the most effective egress of passengers in the event of an emergency evacuation, 14 C.F.R. § 121.391(d) (1982); (2) to assign emergency functions to each attendant, 14 C.F.R. § 121.397 (1982); and (3) to conduct initial, transition, and recurrent training of flight attendants using FAA approved courses, including drill training in emergency evacuations and other emergency events.[12] 14 C.F.R. §§ 121.401, 121.415(a)(3), 121.417, 121.421, 121.427 (1982). In the course of training, flight attendants must be given "a comprehensive check to determine ability to perform assigned duties and responsibilities." 14 C.F.R. §§ 121.421(b), 121.422(b), 121.427(b)(3) (1982).

In view of the pervasive nature of the federal regulatory scheme, courts have not hesitated to find *total* federal preemption of the field of airline safety. For example, in *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, which involved a city's attempt to regulate aircraft noise, the Court quoted from the following passage in Justice Jackson's concurring opinion in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944):

> Congress has recognized the national responsibility for regulating air commerce. *Federal control is intensive and exclusive.* Planes do not wander about in

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chutes, and operation of life rafts, lines and vests. 14 C.F.R. § 121.417(c) (1982).

[12] The airline must show by actual demonstration that its flight attendants are able to conduct such an evacuation within ninety (90) seconds. 14 C.F.R. § 121.291 (1982). To satisfy the demonstration requirement, the aircraft must be loaded to capacity with passengers, including a minimum number of women, children and elderly persons. 14 C.F.R. § 121.291 (App. D(a)(7)). The crew must then demonstrate the ability to evacuate all persons from the plane in darkness, without normal electrical power, with baggage blocking the aisles and accessways, and with only half of the emergency exits functioning. 14 C.F.R. §§ 121.291 (App. D(a)(4), (10), (13), (17)) (1982).

> the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.

322 U.S. at 303 (emphasis added). The majority in *Burbank* went on to state:

> The Federal Aviation Act requires a delicate balancing between safety and efficiency, 49 U.S.C. § 1348(a), and the protection of persons on the ground. 49 U.S.C. § 1348(c). Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest possible degree of safety." 49 U.S.C. § 1431(d)(3). *The interdependence of these factors require a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.*

411 U.S. at 638-39 (emphasis added). The dissent, moreover, agreed that Congress had preempted the field of air safety: "[t]he paramount substantive concerns of Congress were to regulate federally *all aspects* of air safety. . . . " *Id.* at 644 (Rehnquist, J.) (emphasis added); *see also World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division*, 578 F.2d at 803 ("Federal law has prempted the area of aviation"); *accord United States v. Christenson*, 419 F.2d 1401, 1403-04 (9th Cir. 1969).

Even the State of New York has recognized federal superintendenace in the field of air safety. For example, in *Manfredonia v. American Airlines, Inc.*, 68 A.D.2d 131, 416 N.Y.S.2d 286 (1979), the New York Supreme Court noted that:

> Federal law *exclusively* governs the operation, control, and *safety of air carriers* . . . . Preemption by Congress of a field of regulation implies an inherent need for nationwide uniformity and Federal primacy . . . particularly in the field of air commerce.

Id. at 290 (emphasis added); *see also American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226, 232

(E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969) ("It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation").[13]

In summary, the dominance of the federal interest, the potential for conflicting state regulations, and the pervasiveness of the federal regulatory scheme make it clear that Congress has totally preempted and occupied the field of airline safety. New York's attempted regulation of TWA's maternity leave policy for flight attendants clearly encroaches upon this regulatory field and presents a substantial federal question for decision by this Court.

B. The Application of New York's HRL To Require a Modification of TWA's Maternity Leave Policy for Flight Attendants Conflicts with TWA's Federal Duty To Conduct Its Operations with the Highest Possible Degree of Safety.

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent it actually conflicts with federal law. *Fidelity Federal Savings & Loan Association v. Cuesta*, 102 S.Ct. 3014 (1982). Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Jones v. Rath Pack-*

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[13] Recent decisions of this Court involving attempted state regulation of interstate carriers also strongly support a finding of preemption in the present case. *See e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

ing Co., 430 U.S. at 526; *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 773 (1947).

In determining whether both federal and state regulations may operate, or the state regulation must give way, it is immaterial whether the regulations are aimed at similar or different objectives. If a conflict exists, the state regulation must yield. *Perez v. Campbell*, 402 U.S. 637, 651 (1971); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 142.

As noted above, section 601(b) of the Federal Aviation Act requires interstate air carriers, such as TWA, to conduct their operations "with the highest possible degree of safety." 49 U.S.C. § 1421(b) (1976); *see also*, 49 U.S.C. § 1424 (1976). This duty includes the obligation to employ at all times the most highly qualified persons in positions affecting the safety of its passengers. *Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. at 435.

It is undisputed that flight attendants are in the first instance safety personnel, who must be physically and mentally capable of performing their emergency duties at all times. FAA regulations require flight attendants to serve on board commercial aircraft for the primary purpose of assisting passengers in the event of an emergency and prescribe comprehensive performance standards. 14 C.F.R. § 121.391, 121.397 (1982). The reason for the FAA's detailed regulations concerning the emergency duties of flight attendants is elementary—passenger injuries and deaths will be less likely if well-trained and physically able flight attendants are available in the event of an emergency.[14]

TWA has determined, based on sound medical evidence, that the safety of its passengers and employees would be seriously jeopardized by allowing flight attendants to con-

[14] The record in this case is replete with evidence showing how the availability of well-trained and able flight attendants has made the ultimate difference in the saving of passenger lives during aircraft accidents.

tinue flying while pregnant.[15] This determination is based primarily on two facts, both of which are firmly established by the record below.[16] First, there is a medically documented and substantial risk that a pregnant flight attendant may become incapacitated during flight as a result of fainting, extreme fatigue, nausea, vomiting, or spontaneous abortion, and be incapable of performing her emergency duties.[17] Second, the evidence of record unequivocally shows that it is impossible to predict on the basis of individual examinations which women will

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[15] In addition to pregnancy, TWA has identified other physical conditions that could interfere with a flight attendant's performance of his or her emergency duties and has determined that any flight attendant who has one of these conditions should not be allowed to fly. These conditions include: insulin dependant diabetes, potentially disabling heart conditions, epilepsy, mental instability, and drug or alcohol abuse problems.

[16] TWA respectfully submits that even if a controversy did exist among medical experts as to whether pregnant flight attendants should be permitted to continue on flight duty, the very existence of such a controversy would require a conservative decision by management. As a result of the standards and rules prescribed for commercial air carriers by the FAA, TWA is required to adopt a conservative stance regarding fitness standards for flight personnel. *Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. 413 (N.D. Cal. 1977), *aff'd* 649 F.2d 670 (9th Cir. 1980); *Condit v. United Air Lines, Inc.*, 13 Fair Empl. Prac. Cas. (BNA) 689 (E.D. Va. 1976); *cf. Hodgson v. Greyhound, Inc.*, 499 F.2d 859 (7th Cir.), *cert. denied*, 419 U.S. 1122 (1974); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

[17] The Division's findings to the contrary are devoid of *any* support in the record. All evidence presented at the hearing, including the testimony of Dr. Andre Hellegers upon which the Division exclusively relied, acknowledged that: (1) pregnant women suffer nausea and vomiting more frequently than non-pregnant women and that ninety percent (90%) of all pregnant women experience nausea and/or vomiting during the first trimester of pregnancy; (2) pregnant women faint more frequently than non-pregnant women; and (3) between ten and twenty percent of all pregnancies terminate in spontaneous abortions during the first trimester.

experience any one or more of these potentially disabling occurrences at any time during pregnancy.[18]

In response to these facts, and in compliance with its federal safety obligations, TWA has adopted what is undeniably the safest policy for the protection of its passengers by requiring pregnant flight attendants to cease flying immediately upon becoming aware of the condition of pregnancy. The State of New York, however, has ordered TWA to abandon this policy and to substitute a policy which New York deems to be "safe enough." As an interstate air carrier with a federal duty to conduct its operations with the "highest possible degree of safety," TWA respectfully submits that "safe" is *not* enough; rather, its federal obligations require TWA to adopt the "safest" policy in dealing with the admitted risks associated with flight attendant pregnancies. *See Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).[19]

Although the Division attempted to minimize the safety risks associated with the condition of pregnancy, its arguments simply miss the point. As an interstate air carrier with a public duty to operate with the highest possible

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[18] All of the medical experts who testified on the point agreed that it is impossible to predict through individual examination which women will experience a potentially disabling complication at any given time during pregnancy.

[19] In *Murnane* the importance of safety in the operation of interstate airlines was emphasized as follows:

> [T]he airline industry is one in which safety is of the utmost importance. . . . Therefore, . . . the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely* (citations omitted). This is in accord with American's view that "safe" is not sufficient. Rather, the "safest" possible air transportation is the ultimate goal. Courts . . . do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.
>
> 667 F.2d 101.

degree of safety, TWA is in the business of avoiding and managing risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is of the essence of TWA's business, since aircraft accidents and incidents are invariably unique and low probability occurrences. Simply stated, by failing to deal with a known risk-causing factor, such as pregnancy, TWA would be breaching its federal duty to operate "with the highest possible degree of safety."

In summary, New York's construction of the HRL to require an abandonment of TWA's maternity leave policy for flight attendants creates a direct substantive conflict between state and federal law. TWA cannot comply with its federal duty to conduct its operations "with the highest possible degree of safety" if it is prohibited by the State of New York from following a policy that minimizes the medically documented risk that a pregnant flight attendant may become incapacitated during flight and be incapable of performing her emergency duties. Where, as here, compliance with both federal and state regulations is impossible, the state regulation must fall. *Jones v. Rath Packing Co.*, 430 U.S. at 526; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. at 142-43.

C. The Application of New York's HRL to Require a Modification of TWA's Maternity Leave Policy for Flight Attendants Places an Unconstitutional Burden on Interstate Commerce.

The Commerce Clause of the United States Constitution, U.S. Const. art. 1, § 8, cl. 3, affirmatively grants to Congress the plenary power to regulate commerce among the several states and, correlatively, limits the scope of permissible regulation by the states. *Cooley v. Board of Wardens*, 53 U.S. 299 (1851). Attempted state regulation of various aspects of interstate commerce may run afoul of the Commerce Clause not only in situations in

which there is an *actual* inconsistency between state and federal requirements, *cf. Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), but also in situations in which commerce is burdened by a *potential* for inconsistent state regulations. *Edgar v. Mite Corp.*, 102 S.Ct. 2629 (1982); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Hall v. De Cuir*, 95 U.S. 485 (1878). In this case, the Division's construction and application of New York's HRL to require a modification of TWA's maternity leave policy for flight attendants places an intolerable burden on interstate commerce by creating a potential for conflicting and inconsistent state regulations.

As previously discussed, the potential for conflicting state regulations concerning the maternity leave policies of interstate air carriers is substantial. If the state of New York is allowed to regulate TWA's flight safety policies pursuant to its police powers, it follows that other states could do so as well. Thus, while New York might require TWA to permit flight attendants to continue flying through the twenty-seventh (27th) week of pregnancy, there would be nothing to prevent the State of Michigan from requiring a policy that allowed flight attendants to fly through the thirtieth (30th) week of pregnancy, the State of Pennsylvania from determining that flight attendants should only be allowed to fly through the fifteenth (15th) week, and the State of California from requiring a policy that prohibits flight attendants from flying at all during pregnancy. Under these circumstances, it would be impossible for TWA to comply with the requirements of each state in a direct flight from New York to Los Angeles with intermediate stops in Philadelphia and Detroit. Such a potential for inconsistent state regulation plainly demonstrates that this issue is inappropriate for state action.

While it is true that in evaluating a Commerce Clause challenge to state regulation, courts must balance the

state interest against the federal interest, *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), the application of this balancing approach to the present case merely confirms that New York's attempted regulation of TWA's safety policies violates the Commerce Clause. The federal interest in this area is twofold. First, there is a strong national interest in facilitating unencumbered interstate travel by maintaining uniform regulation of interstate carriers. *See Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981). Second, and more importantly, there is a vital federal interest in providing for the highest possible degree of safety in air travel. *See* 49 U.S.C. §§ 1302(a)(1), (2), 1421(b)(1); *see also Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981).

The state interest, on the other hand, is in eliminating what New York perceives to be sex discrimination. Although TWA vigorously contests the claim that its maternity policy constitutes sex discrimination at all, any adverse effects that its policy may have on female flight attendants are extremely minimal in any case. Indeed, the only considerations that allegedly weigh in favor of forcing TWA to abandon its policy are monetary ones relating to the period of maternity leave itself—considerations which have largely disappeared since flight attendants now receive income maintenance benefits while on maternity leave.[20]

Balancing this rather minor state interest against the important federal interests of ensuring uniformity and the public safety leads inevitably to the conclusion that the latter outweigh the former. Indeed, in balancing safety interests against the *federal* interest in eliminating discrimination, federal courts have consistently reached the conclusion that safety considerations must

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[20] *See* Pregnancy Disability Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

prevail. *See e.g., Air Lines Pilots Association, International v. Quesada*, 182 F.Supp. 595, 596 (S.D.N.Y. 1960), *aff'd*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961) (noting that "[a]ny attempt to weigh the countervailing considerations of dollar loss . . . against the public safety in air carrier operations borders on vulgarity"); *Murnane v. American Airlines, Inc.*, 482 F.Supp. at 147 ("individual interests in being free of employment discrimination on account of age must give way to the societal interest in having the safest air transportation system possible"); *cf. Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977). In the instant case, it is inconceivable that in evaluating the competing interests a court could place a higher value on the minor monetary interests asserted by the State of New York on behalf of pregnant flight attendants than on the safety of the traveling public.

Thus far the Division's only response to TWA's claims under the Commerce Clause has been a citation to the case of *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963).[21] In *Continental*, the black plaintiff complained to the Colorado Anti-Discrimination Commission that Continental Air Lines, an interstate air carrier, had refused to hire him because of his race. The Court determined that the case presented the issue of whether the Colorado Anti-Discrimination Act of 1957 could legally be applied to regulate the hiring practices of an interstate air carrier. In deciding that the state statute could be so applied, the Court relied on the fact that there was virtually no chance that an interstate carrier would find itself subject to conflicting state statutes on the issue of racial discrimination. Whereas Colorado had forbidden racial discrimination in hiring, no other state could *require* such discrimination and therefore place an interstate carrier

[21] In fact, citations to the *Continental* case have comprised the Division's only response to *any* of TWA's constitutional arguments throughout the entirety of this case.

in the situation of being unable to comply simultaneously with all applicable state laws.[22]

In this case, unlike *Continental*, there is a real and substantial possibility that TWA could face conflicting state regulations with regard to the timing of maternity leaves for flight attendants. Thus, the burden that could not exist in *Continental* does exist here. Under these circumstances, the Division's attempted regulation of TWA's maternity leave policy is clearly prohibited by the Commerce Clause.

D. TWA Has Been Denied Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution By Appellees' Refusal To Decide this Case Based on the Evidence and Appellees' Failure To Consider, Address or Decide Any of TWA's Constitutional Claims.

It was TWA's position before the Division that New York law could not be interpreted or applied so as to require the abandonment or alteration of an airline safety policy maintained for the purpose of complying with its federal safety duty and, consequently, that the Division's Complaint should be dismissed.[23] TWA's alternative defense was that its policy did not violate New

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[22] The Court also considered the question whether the antidiscrimination provisions of certain federal statutes, including the Federal Aviation Act, preempted the field of antidiscrimination legislation as applied to interstate carriers. For similar reasons, the Court determined that federal law had not preempted the field of antidiscrimination legislation. However, that issue—preemption of the field of antidiscrimination regulation as opposed to airline safety regulation—is not involved in the present case.

[23] Arguably a state could allege and prove that a safety policy was in fact not a safety policy at all but a mere pretext for action prohibited by state law. In such a case it might be found that the state's action did not intrude on an area reserved for exclusive federal regulation. *See* Sections A, B & C above. But here, the Division neither alleged, proved nor found TWA's policy to be pretextual. Here a state agency, lacking any expertise in airline operations, merely substituted its judgment and safety policy for that of the airline.

York law in any event because it was not sex discriminatory but rather a reasonable business policy required by the nature of TWA's business and the known medical risks associated with the condition of pregnancy. On this latter point, and because the Division would not consider TWA's motion to dismiss until after the hearing, TWA presented three safety and six medical experts, all of whom explained and supported TWA's policy.

There is absolutely no indication in any of the decisions below that *any* of the evidence or legal arguments offered by TWA *were even considered*. In fact, the only conclusion that can fairly be drawn from the proceedings to date is that the result below was predetermined and that TWA was denied the fair hearing required by due process of law.

1. *TWA was denied due process of law by Appellees' failure to consider its federal defenses.*

At its first opportunity, TWA urged that the Division was prohibited by federal law from applying New York law in such a way as to require TWA to abandon one safety policy for flight attendants and substitute another in its place. In his recommended Findings of Fact, Decision and Order, the hearing examiner did not address or even mention TWA's numerous authorities. The Commissioner's order differed little from the one recommended by the hearing examiner and again totally ignored TWA's federal defenses.

The Division's total refusal to deal with federal defenses submitted by a party appearing before it is by no means unique to the present case. In *Burroughs Corporation v. Kramarsky*, No. 79-778 (W.D.N.Y. Nov. 14, 1979), *aff'd on reh'g*, 666 F.2d 26 (2d Cir. 1981), *prob. juris. noted*, 102 S.Ct. 1968 (1982), *argued sub nom. Shaw v. Delta Air Lines, Inc.*, Jan. 10, 1983,[24] the court addressed

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[24] The *Burroughs* case involved the same benefits issues originally involved in this case and is currently pending before this Court *sub nom. Shaw v. Delta Air Lines, Inc.* Case No. 81-1478. The district

a similar refusal by the Division to deal with federal defenses. In that case the court held that attempts to present federal defenses to the Division and "through the state adjudicative process would be futile." Judge Burke's observations on how the Division deals with employers who attempt to assert federal defenses is an accurate description of TWA's experience in this case:

> Defendant's processing of complaints filed by Burroughs' employees demonstrates the futility of Plaintiff's attempt to raise its federal issues within the State administrative proceedings. Plaintiff's attempts were met with prejudgment, bias, and repeated violations of its elemental due process right to be heard. Any attempt by Plaintiff to raise its federal constitutional issues was, and is likely to remain in the future, an exercise in futility.
>
> The Supreme Court has recognized that similar bias and prejudgment by an administrative body justifies the interposition of a Federal Court's injunctive and declaratory powers (citations omitted).
>
> Defendants' adjudicative procedures are so tainted that Plaintiff has not received, nor can it expect to receive, a fair hearing on its federal constitutional claim.

The Division gave TWA's federal defenses in this case exactly the same consideration it gave those of the plaintiff in *Burroughs*—none at all.

Before the Human Rights Appeal Board, before the Appellate Division of the New York Supreme Court, and before the Court of Appeals of the State of New York, TWA met with exactly the same response. Although TWA strenuously and at every opportunity urged and fully briefed its federal claims, its arguments were met with silence.

TWA does not assert that at every step of every case, from initial agency decision through ultimate disposition

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court's opinion appears at pages 107-117 of the Appendix to the Jurisdictional Statement in that case.

on appeal by the highest court of the state, every legal argument raised must be addressed and discussed in detail. However, TWA does assert that due process requires that at *some* point in the process *some* indication be made that *some* consideration has been given to *some* of the legal defenses asserted by the party which has been put on trial. TWA's constitutional arguments on the maternity leave question are substantial as this jurisdictional statement shows. These are the same arguments that were presented at every stage of the proceedings in the State of New York. Yet none of these defenses was ever mentioned in any of the several orders issued below. The only implication which can be drawn is that, as in the *Burroughs* case, TWA's defenses were simply ignored because of prejudgment. This is not the fair treatment required by the Due Process Clause of the Fourteenth Amendment. *Gibson v. Berryhill*, 411 U.S. 564; *In re Murchison*, 349 U.S. 133 (1955).

2. *TWA was denied due process of law by Appellees' failure to render a decision based on the evidence adduced at the hearing.*

There can be little doubt that the Division never intended to consider TWA's evidence on the maternity leave issue any more than its considered TWA's federal defenses. The Division apparently takes the position that the result in the *Rosenfeld* case constitutes some sort of *per se* rule for the airline industry. That result, based totally on the testimony of Dr. Hellegers, an individual who by his own admission was only "weakly" familiar with the duties of flight attendants, has become, in the Division's view, the *law* of the State of New York. While the notion that the New York State Division of Human Rights has the competence or expertise to promulgate a *per se* safety rule for the airline industry is ludicrous, the notion that the Division has the jurisdiction to do so is frightening; yet this is precisely what the Division thinks it did in *Rosenfeld*.

Neither in the recommended findings by the hearing examiner, nor in the actual findings of the Commissioner, was there even the briefest mention of the mass of evidence submitted by TWA in support of its policy. No mention was made of the safety standard applicable to TWA and all interstate air carriers, and no mention was made of the unique safety aspects of the flight attendant position. The reason for such a conspicuous omission was made perfectly clear in the Division's Reply Brief before the Appeal Board, where it stated:

> No facts were presented by TWA to distinguish TWA's policy from the policy in question in *Rosenfeld*. The *law* in New York is that an airline, absent medical proof of disability, may not unilaterally require a pregnant flight attendant to take an unpaid leave of absence . . . .

With such an attitude, allowing TWA to present its nationally and internationally known medical experts to offer their contrary opinions amounted to nothing more than a cruel hoax. The Division had no intention of listening to these experts and it in fact did not listen to them. Thus, the "hearing" which TWA received was a far cry from a "fair trial" before a "fair tribunal." *In re Murchison*, 349 U.S. 133 (1955).[25]

The treatment meted out to TWA by the Appellees presents substantial questions arising under the Due Process

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[25] The failure to make findings of fact alone renders the Division's actions infirm. Whether the evidence might have justified findings supporting the result in this case can never be known because there were simply no findings to support any result. As this Court stated in the seminal administrative law case of *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94 (1943):

> The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interest protected by the Act. There must be such a responsible finding. For the Courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review.

Clause of the Fourteenth Amendment. This Court is TWA's last resort not only in the sense that it is the highest court in the land, but also in the sense that an appeal to this Court is TWA's last chance to have the issues and evidence considered at all by a fair and impartial decision maker. A finding that this case does not present "substantial" federal questions would be the equivalent of granting a license to the Division to continue its high handed tactics.

CONCLUSION

It is respectfully submitted that the Constitutional issues presented in this appeal are both substantial and important, and that this Court should note probable jurisdiction and take this case under plenary consideration.

Respectfully submitted,

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82-1899

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
Appellant,

v.

NEW YORK STATE HUMAN RIGHTS APPEAL BOARD AND
NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Appellees.

On Appeal from the Court of Appeals of the State of New York

APPENDIX TO THE JURISDICTIONAL STATEMENT

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Complaint of New York State Division of Human Rights, December 14, 1983

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

Case No. CS-32064-73

CI (Ie) CS-2-73

STATE DIVISION OF HUMAN RIGHTS,
Complainant,

- against -

TRANS WORLD AIRLINES, INC.,
Respondent.

COMPLAINT

The New York State Division of Human Rights, with offices at 270 Broadway, New York, New York, by its duly authorized representative, hereby alleges against respondent whose name and address is Trans World Airlines, Inc., 605 Third Avenue, New York, New York as follows:

CHARGE

Respondent has violated Section 296.1 of the Human Rights Law by pursuing policies and/or practices which unlawfully discriminate against female employees because of their sex.

PARTICULARS

1. Upon information and belief, the respondent is a corporation employing four or more persons within the State of New York.

2. Upon information and belief, the respondent maintains a practice and/or policy with regard to pregnant female employees which denies to such employees the same or similar treatment accorded to male employees with temporary disabilities.

3. Upon information and belief, that by reason of the foregoing, the respondent denies to its female employees equal terms, conditions and privileges of employment because of their sex in violation of the Human Rights Law.

Dated: New York, New York
Dec. 14, 1973

JAMES C. AUSTIN
Notary Public
State of New York
No. 41-5128535
Qualified in Queens County
Term Expires March 30, 1974

/s/ Ronni B. Smith
RONNI B. SMITH
Director
Compliance Investigations

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Ronni B. Smith, being duly sworn, deposes and says that she is Director of Compliance Investigations of the State Division of Human Rights, the complainant herein; that she is acquainted with the facts of this proceeding; and that the same is true to her own knowledge as to

matters therein stated on information and belief, and that as to these she believes the same to be true.

/s/ Ronni B. Smith
RONNI B. SMITH
Director
Compliance Investigations

Sworn to before me this
14th day of Dec. 1973

JAMES C. AUSTIN
Notary Public
State of New York
No. 41-5128535
Qualified in Queens County
Term Expires March 30, 1974

Amended Answer of Trans World Airlines, Inc., March 25, 1977

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

Case No. CS-32064-73

CI-(Ie) CS-2-73

STATE DIVISION OF HUMAN RIGHTS,
Complainant,
v.
TRANS WORLD AIRLINES, INC.,
Respondent.

AMENDED ANSWER

COMES NOW Respondent, TRANS WORLD AIRLINES, INC., and amends its Answer to Complainant's Complaint herein as follows:

FIRST DEFENSE

Complainant's Complaint fails to state a claim under the New York Human Rights Law upon which relief can be granted.

SECOND DEFENSE

The Complainant lacks jurisdiction to hear or prosecute the Complaint insofar as Respondent's maternity leave policies for flight personnel are concerned because these policies are regulated and required by federal laws, including the Federal Aviation Act of 1958, 49 U.S.C. Sect. 1301, et seq., the Occupational Safety and Health Act of 1970, 29 U.S.C. Sect. 651, et seq., and the Railway Labor Act, 45 U.S.C. Sect. 151, et seq. The Com-

plainant has no jurisdiction to regulate in this field which has been preempted and occupied by the federal government. State regulation in this field would be an intolerable burden on interstate commerce. U.S. Const. art. I, § 8, cl. 3.

THIRD DEFENSE

The Complainant lacks jurisdiction to hear or prosecute the Complaint insofar as the non-inclusion of pregnancy coverage in Respondent's employee benefits policies is concerned because these policies are regulated and required by federal laws, including Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., the Equal Pay Act of 1963, 29 U.S.C. § 206(d), the Railway Labor Act, 45 U.S.C. § 151 et seq., and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. The Complainant has no jurisdiction to regulate in this field which has been preempted and occupied by the federal government.

FOURTH DEFENSE

Under Respondent's employee benefits policies, women as a class already receive a larger percentage of total benefits and the provision of the additional benefit sought by Complainant would cause Respondent to be in violation of its duties under federal laws, to wit: Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). Respondent's duty to comply with federal law, in the event that duty conflicts with state law, is preeminent under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2.

FIFTH DEFENSE

Even if The State of New York is not preempted from regulation, Respondent's maternity leave policies are required by New York laws imposing safety duties on airlines and employers, including but not limited to *N.Y.*

Transp. Law Section 96 (McKinney 1973) and *N.Y. Gen. Bus. Law* Section 245(1) (McKinney 1968). These policies are therefore legal and not in violation of the Human Rights Law.

SIXTH DEFENSE

Even if the State of New York is not preempted from regulation, the non-inclusion of pregnancy coverage in Respondent's fringe benefits policies is required by the New York Equal Pay Law, *N.Y. Labor Law* Section 194 (McKinney Supp. 1973-74), and therefore does not violate the Human Rights Law.

SEVENTH DEFENSE

Even if Complainant's allegations were true and correct, which in required particulars they are not, the practices of Respondent do not constitute discrimination on the basis of sex in violation of the Human Rights Law.

EIGHTH DEFENSE

Even if Complainant's allegations were true and correct, which in required particulars they are not, Complainant would not be entitled to relief because the policies of Respondent are based on reasonable foundations, including, but not limited to, safety considerations and the prevention of discrimination.

NINTH DEFENSE

Even if Complainant's allegations were true and correct, which in required particulars they are not, Complainant would not be entitled to relief because the policies of Respondent are required by business necessity.

TENTH DEFENSE

In answer to the specifically enumerated paragraphs of Complainant's Complaint, Respondent answers as follows:

1.

The Charge contained in the Complaint is denied. Paragraph one is admitted.

2.

Paragraph two is denied. With respect to maternity leave, Respondent permits each employee, regardless of sex, to continue to work as long as that employee is capable of performing his duties with the degree of safety required by the individual's particular job. With respect to compensation, Respondent provides equal pay for equal work regardless of sex. All other policies of Respondent are also designed and administered in a non-discriminatory manner.

3.

Paragraph three is denied.

WHEREFORE, Respondent, having fully answered, prays that this charge be dismissed, and for such other relief as is deemed proper.

Respectfully submitted,

/s/ Dean Booth
DEAN BOOTH

/s/ J. Stanley Hawkins
J. STANLEY HAWKINS

/s/ Otto F. Feil III
OTTO F. FEIL III

Attorneys for Respondent

Troutman, Sanders,
Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303
Telephone 658-8000

Recommended Findings of Fact, Decision and Order of Administrative Law Judge, New York State Division of Human Rights, May 23, 1979

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
on the complaint(s) of
STATE DIVISION OF HUMAN RIGHTS,
Complainant,

- against -

TRANS WORLD AIRLINES, INC.,
Respondent.

Case No. (S) CS-32064-73

RECOMMENDED FINDINGS OF FACT, DECISION AND ORDER

PROCEEDINGS IN THE CASE

On the 14th day of December, 1973, the above-named Complainant filed a complaint, charging the above-named Respondent with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in an unlaw-

ful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Irwin H. Pantell, Esq., an Administrative Law Judge of the Division. The hearing was held on various dates between November 24, 1975 and September 28, 1978.

Complainant and Respondent appeared at the hearing. Respondent was represented by Seward & Kissel, Esqs., by Dean Booth and J. Stanley Hawkins, Esq., of Counsel. The Division was represented by Ann Thacher Anderson, Esq., General Counsel, by Rosamond Prosterman, Esq., of Counsel. The final transcript was received on October 12, 1978. Respondent's post-hearing memorandum was received on February 7, 1979 and the Division did not file a memorandum.

FINDINGS OF FACT

The New York State Division of Human Rights, in a Division Initiated Complaint, has charged Respondent, an air carrier and corporate employer of four or more persons within the State of New York, with failure to provide its employees with sick pay and disability benefits during a pregnancy disability and with compelling female flight attendants to notify their supervisors immediately upon learning of their pregnancy and compelling such employees to go on unpaid leave without regard to their ability to perform their services. Respondent provides income maintenance to employees absent from work due to illness or injury in the form of sick pay and sickness or accident disability insurance benefits.

RESPONDENT'S CONTENTIONS

In essence, Respondent contends that the application to it of the New York State Human Rights Law is unconstitutional; that Federal laws have preempted the field; and, that the Respondent is entitled to a bona fide occupational qualification.

STIPULATION

The parties stipulated that the transcript of the testimony of Dr. Andre E. Hellegers be incorporated into the record of these proceedings.

On January 16, 1975, Dr. Hellegers, a Professor of Obstetrics and Gynecology, Professor of Physiology and Biophysics and Director of the Kennedy Institute for the study of human reproduction bioethics, testified, as an expert for the Complainant in Rosenfeld v. United Airlines, Inc., et al., CS 32898-74.

OPINION

The issues presented in this proceeding were considered and disposed of in *Rosenfeld* v. *United Airlines, Inc.*, decided by the Commissioner September 10, 1975; affirmed 61 A.D. 2d 1010, 402 N.Y.S. 2d 630 (2nd Dept., 1978) affirming N.Y.S.H.R.A.B., Appeal Nos., 3558 and 3065; motion for leave to appeal denied 44 N.Y. 2d 648 (1978), cert. denied —— U.S. ——, 58 LED 2d 653 (1979).

The preemption argument has been considered and rejected by the Courts. *Eastern Airlines, Inc.* v. *State Human Rights Appeal Board, etc.*, 65 A.D. 2d 961 ——, (1978); *United Federation of Teachers Welfare Fund* v. *State Human Rights Appeal Board*, 53 App. Div. 2d 808, motion for leave to appeal denied 40 N.Y.2d 809 (1977). Thereafter the Court of Appeals again rejected the argument when urged in a motion to reargue, *Gas Company* v. *N.Y.S. Human Rights Appeal Board* 41 N.Y. 2d 84 (1976), reargument denied 42 N.Y. 2d 824, decided 4/28/77.

DECISION

Upon the basis of the foregoing I find, that by failing to provide its employees with sick pay and disability benefits during a pregnancy disability; and, that by compelling female flight attendants to take a mandatory unpaid leave at the onset of pregnancy without regard to the

ability of such employee to perform the duties of her occupation, the Respondent committed an unlawful discriminatory practice against its female employees on the basis of their sex, in violation of the Human Rights Law.

ORDER

Upon the basis of the foregoing facts, opinion and decision, and pursuant to the Human Rights Law, it is hereby

ORDERED, that the Respondent Trans World Airlines, Inc., its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the sex of such person; and it is further

ORDERED, that the Respondent Trans World Airlines, Inc., its agents, representatives, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondent shall permit pregnant stewardesses to work until their twentieth week of pregnancy provided that said stewardesses, if requested to do so, obtain from their doctor a semi-monthly statement confirming that their continued employment as a stewardess is not a health or safety hazard.

2. From the twentieth to the twenty-eighth week of pregnancy, Respondent may disqualify a pregnant stewardess from further flight duty should it find, as a result of its own medical examination, that said stewardess can no longer perform her duties without risk to her health or the safety of the passengers and crew, or both.

3. During and after the twenty-eighth week of pregnancy, Respondent may disqualify a pregnant stewardess from further flight duty without regard to her physical condition at that time.

4. Respondent shall provide accrued sick leave benefits and disability benefits to female employees for pregnancy-connected disabilities to the same extent it provides such benefits to employees for other types of temporary physical disability.

5. Respondent shall send a memorandum to all supervisory employees, agent, officers and to all recognized unions instructing them that it has a policy of non-discrimination because of sex in the treatment of employees, and that such supervisory employees, agents and/or representatives are required to implement said policy.

6. Respondent shall make available to the duly-authorized representatives of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

Dated: May 23, 1979
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/s/ Irwin H. Pantell
IRWIN H. PANTELL
Administrative Law Judge

Order of Commissioner,
New York State Division of Human Rights,
June 27, 1979

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

Case No. (S) CS-32064-73

STATE DIVISION OF HUMAN RIGHTS
on the complaint(s) of
STATE DIVISION OF HUMAN RIGHTS,
Complainant,

- against -

TRANS WORLD AIRLINES, INC.,
Respondent.

PROCEEDINGS IN THE CASE

On the 14th day of December, 1973, the above-named Complainant by its Director Compliance Investigations filed a complaint charging the above-named Respondent with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Irwin H. Pantell, Esq., an Administrative Law Judge of the Division. The hearing was held on various dates between November 24, 1975 and September 28, 1978.

Complainant and Respondent appeared at the hearing. Respondent was represented by Bruce W. Solow, Esq., and by Troutman, Sanders, Lockerman & Ashmore, Esqs., by Dean Booth, J. Stanley Hawkins, Esq., Robert L. Mote, Esq. and William H. Boice, Esq., of Counsel, and by Seward & Kissel, Esqs., by John Grubb, Esq., of Counsel. The Division was represented by Ann Thacher Anderson, Esq., General Counsel, by Rosamond Prosterman, Esq., of Counsel.

The final transcript was received on October 12, 1978. Respondent's Post-Hearing Memorandum was received on February 7, 1979, and the Division did not file a memorandum.

FINDING OF FACT

1. The New York State Division of Human Rights, in a Division-Initiated Complaint, has charged Respondent, an air carrier and corporate employer of four or more persons within the State of New York, with failure to provide its employees with sick pay and disability benefits during pregnancy-connected disabilities and with compelling female flight attendants to notify their supervisors immediately upon learning of their pregnancy and compelling such employees to go on unpaid leave without regard to their ability to perform their services. Respondent provides income maintenance to employees absent from work due to illness or injury in the form of sick pay and sickness or accident disability insurance benefits.

2. In essence, Respondent contends that the application to it of the New York State Human Rights Law is unconstitutional; that Federal laws have pre-empted

the field; and, that the Respondent is entitled to a bona fide occupational qualification.

3. On January 16, 1975, Dr. Hellegers, a Professor of Obstetrics and Gynecology, Professor of Physiology and Biophysics and Director of the Kennedy Institute for the study of human reproduction bioethics in Washington, D.C., testified, as an expert for the complainant in Case CS-32898-74, *Rosenfeld* v. *United Airlines, Inc.*, et al.

4. The parties herein stipulated that the transcript of the testimony of Dr. Andre E. Hellegers be incorporated into the record of these proceedings.

5. Dr. Hellegers testified and I find that in the first five months or twenty weeks of pregnancy, the expectant stewardess presents no greater risk than the non-pregnant stewardess; that the twentieth to the twenty-eighth week of pregnancy is a "gray area" in which the individual condition of the pregnant stewardess has to be considered; and that it would not be unreasonable for an airline to require all pregnant stewardess to discontinue flying at the twenty-eighth week.

OPINION

The issues presented in this proceeding were considered and disposed of in Case No. CS-32898-74, *Rosenfeld* v. *United Airlines, Inc.*, decided by the Commissioner September 10, 1975, aff'd Appeal Nos. 3558 and 3065, confirmed 61 A.D. 2d 1010, 402 N.Y.S. 2d 630 (2nd Dept., 1978), motion for leave to appeal denied 44 N.Y. 2d 648 (1978), cert. denied, —— U.S. ——, 58 L. ed. 2d 653 (1979). Therefore, evidence of the value of fringe benefits to male employees as a class and to female employees as a class was properly excluded.

The ERISA pre-emption argument has been considered and rejected by the New York Courts. *Eastern Airlines, Inc.*, v. *State Human Rights Appeals Board*,

etc., 65 A.D. 2d 961 (1st Dept. 1978); *United Federation of Teachers Welfare Fund* v. *State Human Rights Appeal Board*, 53 App. Div. 2d 808 (1st Dept. 1976), motion for leave to appeal denied 40 N.Y. 2d 809 (1977). The Court of Appeals rejected such an argument when urged in a motion to reargue *Gas Company* v. *N.Y.S. Human Rights Appeal Board* 41 N.Y. 2d 84 (1976), reargument denied 42 N.Y. 2d 824, decided 4/28/77.

The Division, however, is bound by the provisions of Disability Benefits Law, Section 205.3 (as amended by L. 1977, C. 675, effective Aug. 3, 1977) that the liability of the employer provided by that Law is "the exclusive statutory remedy of an employee for disability caused by or arising in connection with a pregnancy."

DECISION

Upon the basis of the foregoing, I find that by failing to provide its employees with sick pay and disability benefits during a pregnancy-connected disability, and, by compelling female flight attendants to take a mandatory unpaid leave at the onset of pregnancy without regard to the ability of such employee to perform the duties of her occupation, the Respondent committed an unlawful discriminatory practice against its female employees on the basis of their sex, in violation of the Human Rights Law.

ORDER

Upon the basis of the foregoing Facts, Opinion and Decision, and pursuant to the Human Rights Law, it is hereby

ORDERED, that the Respondent Trans World Airlines, Inc., its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the sex of such person; and it is further

ORDERED, that the Respondent Trans World Airlines, Inc., its agents, representatives, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondent shall permit pregnant stewardesses to work until their twentieth week of pregnancy, provided that each such stewardess, if requested to do so, obtain from her doctor a semi-monthly statement confirming that her continued employment as a stewardess is not a health or safety hazard.

2. From the twentieth to the twenty-eighth week of pregnancy, Respondent may disqualify a pregnant stewardess from further flight duty should it find, as a result of its own medical examination, that said stewardess can no longer perform her duties without risk to her health or the safety of the passengers and crew, or both.

3. During and after the twenty-eighth week of pregnancy, Respondent may disqualify a pregnant stewardess from further flight duty without regard to her physical condition at that time.

4. Respondent shall provide accrued sick leave benefits to female employees for pregnancy-connected disabilities to the same extent it provides such benefits to employees for other types of temporary physical disability.

5. Respondent shall send a memorandum to all supervisory employees, agents, officers and to all recognized unions instructing them that it has a policy of non-discrimination because of sex in the treatment of employees, and that such supervisory employees, agents and/or representatives are required to implement said policy.

6. Respondent shall make available to the duly-authorized representatives of this Division such documents and information as may be necessary for the Divi-

sion such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

Dated: June 27, 1979
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/s/ Werner H. Kramarsky
WERNER H. KRAMARSKY
Commissioner

Notice of Appeal to
New York State Human Rights Appeal Board,
July 12, 1979

STATE OF NEW YORK
STATE HUMAN RIGHTS APPEAL BOARD

Case No. CS-32064-73

STATE DIVISION OF HUMAN RIGHTS,
Complainant,
v.
TRANS WORLD AIRLINES, INC.,
Respondent.

NOTICE OF APPEAL

Notice is hereby given that Trans World Airlines, Inc., Respondent in the above-captioned action hereby appeals to the State of New York, State Human Rights Appeal Board from the Order issued by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before the Honorable Irwin H. Pantell, Administrative Law Judge, entered in this action on the 27th day of June, 1979.

This 12th day of July, 1979.

Respectfully submitted,

SEWARD & KISSEL

By: /s/ Anthony R. Mansfield
ANTHONY R. MANSFIELD
DEAN BOOTH
J. STANLEY HAWKINS

63 Wall Street
New York, New York 100005
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500 Candler Building
Atlanta, Georgia 30303
(404) 524-2200

Order of New York State Human Rights Appeal Board, March 12, 1981

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

Case No. CS-32064-73
Appeal No. 5950

STATE DIVISION OF HUMAN RIGHTS
on the complaint of
STATE DIVISION OF HUMAN RIGHTS,
Complainant-Respondent

vs.

TRANS WORLD AIRLINES, INC.,
Respondent-Appellant

Argued: February 15, 1980

PRESIDING: Honorable Richard Wong

Appearances:

J. Hawkins, Esq., on behalf of Respondent-Appellant
Complainant-Respondent deemed submitted on record.

ORDER

The above-entitled appeal having been timely filed with this Board, and the Board having reviewed and considered the entire record on appeal herein, and the Board

having discharged its narrowly prescribed review function pursuant to Section 297-a(7) of the Human Rights Law as construed by the Court of Appeals in *300 Gramatan Avenue Associates* v. *State Division of Human Rights*, 45 N.Y.2d 176, and

A majority of the Board having decided that the Order appealed from herein is supported by substantial evidence on the record taken as a whole, it is

ORDERED that the Decision and Order of the Commissioner of the State Division of Human Rights be and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

By /s/ Irma Vidal Santaella
IRMA VIDAL SANTAELLA
Chairman

Dated and Mailed: March 12, 1981

Petition to Supreme Court of the State of New York, Appellate Division, First Department, April 10, 1981

THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION FIRST DEPARTMENT

Case No.———

TRANS WORLD AIRLINES, INC.,
Petitioner-Appellant,

v.

STATE HUMAN RIGHTS APPEAL BOARD, and the STATE DIVISION OF HUMAN RIGHTS,
Respondent.

NOTICE OF PETITION

PLEASE TAKE NOTICE that upon the annexed Petition of Trans World Airlines, Inc. as verified by Roger H. Schnapp, and upon the pleadings and the testimony contained in the written transcript of the record of the prior proceedings had herein before the State Division of Human Rights, Trans World Airlines will move this Court at a term to be held at the Appellate Division of the State of New York, First Judicial Department, 27 Madison Avenue, New York, New York, at a term for motion, on May 4, 1981, for an Order pursuant to Section 298 of the New York Executive Law (Human Rights Law) reversing, vacating and annulling the Order of the State Division of Human Rights as affirmed by the State Human Rights Appeal Board on the grounds that such Order is

contrary to law and is not supported by sufficient or substantial evidence on the record taken as a whole.

Dated: New York, New York
April 10, 1981

Respectfully submitted,

By: /s/ Roger H. Schnapp
ROGER H. SCHNAPP, ESQ.
Attorney for Petitioner-Appellant

TRANS WORLD AIRLINES, INC.
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TO: Commissioner Werner Kramarsky
State Division of Human Rights
Two World Trade Center
New York, New York 10047

Honorable Irma Vidal Santaella, Chairperson
State Human Rights Appeal Board
Two World Trade Center
New York, New York 10047

State Division of Human Rights
Two World Trade Center
New York, New York 10047
Attention: Ann Thatcher Anderson, Esq.
General Counsel

Honorable Robert Abrams
Attorney General
Two World Trade Center
New York, New York 10047

THE SUPREME COURT OF THE STATE OF
NEW YORK APPELLATE DIVISION
FIRST DEPARTMENT

Case No. ———

TRANS WORLD AIRLINES, INC.,
Petitioner-Appellant,

v.

STATE HUMAN RIGHTS APPEAL BOARD, and the
STATE DIVISION OF HUMAN RIGHTS,
Respondents.

PETITION

The Petition of Trans World Airlines, Inc. (hereinafter "TWA"), pursuant to Section 298 of the New York Executive Law (Human Rights Law), respectfully alleges and shows to this Court as follows:

1.

On December 14, 1973, Complainant, STATE DIVISION OF HUMAN RIGHTS (hereinafter "Division"), filed a complaint in its own behalf against TWA, Case No. CS-32064-73, pursuant to Section 297 of the New York Human Rights Law (hereinafter "HRL"). N.Y. [Exec.] 297 (McKinney 1972).

2.

While the complaint was so broad as to be almost meaningless, it developed into a claim that two TWA policies violated the HRL. One issue centered around TWA's former policy of not providing sick pay or sickness or accident disability benefits to employees absent from work

due to normal pregnancy. The other policy challenged is TWA's policy of requiring flight attendants, upon becoming aware of the condition of pregnancy, to immediately notify the company and begin maternity leave of absence. Both policies were alleged to discriminate against TWA's female employees because of their sex in violation of the HRL.

3.

TWA denied the Division's charges and asserted it lacked jurisdiction to hear this matter insofar as TWA's maternity leave policies for flight attendants are concerned because, *inter alia*, these policies are regulated and required by federal laws, including the Federal Aviation Act of 1958, 49 U.S.C. 1301, *et seq.* and the Railway Labor Act, 45 U.S.C. 151 *et seq.* In addition, TWA asserted that the Division had no jurisdiction to regulate in this field of airline safety which has been preempted and occupied by the federal government. TWA contended that state regulation in this field would be an intolerable burden on interstate commerce. U.S. Const. Art. I, Section 8, Cl. No. 3.

TWA also maintained that its maternity leave policies do not constitute discrimination on the basis of sex in violation of the HRL, that its maternity leave policies are based on reasonable foundations, including, but not limited to, safety considerations and that its maternity leave policies are required by business necessity.

4.

A hearing was subsequently held on various dates between November 24, 1975 and September 28, 1978.

5.

Prior to the presentation of evidence, TWA made a motion to dismiss the case on the grounds that the Division did not have jurisdiction or authority to grant the relief sought in the complaint. Transcript at 12. TWA sub-

mitted a memorandum in support of its motion to the Hearing Examiner. Pursaunt to the rules of the Division, ruling on TWA's motion was deferred until after completion of the public hearing for consideration by the Commissioner. No response was ever filed by the Division to TWA's motion.

6.

After the close of the evidence, TWA submitted a post-hearing memorandum and, although the Division received several extensions of time, it never filed a post-hearing memorandum.

7.

On May 23, 1979, the hearing examiner issued his Recommended Findings of Facts, Decision and Order which were adopted, with minor modifications, by the Commissioner as his final Order on June 27, 1979. In his Order, the Commissioner refused to consider TWA's motion to dismiss on its merits and refused to make rulings on the issues raised therein. In his Order, the Commissioner found that TWA's requirement that flight attendants begin maternity leaves immediately upon knowledge of pregnancy violated the HRL and ordered TWA to adopt a substitute policy allowing flight attendants to fly up to the twentieth week of pregnancy without any participation in the decision by TWA as to whether they should continue to so fly, the decision being left solely to the flight attendant and her personal physician. In addition, pursuant to the Commissioner's Order, from the twentieth to the twenty-eighth week of pregnancy TWA may disqualify individual flight attendants following its own medical examination, and after the twenty-eighth week of pregnancy, TWA may have a blanket rule prohibiting all pregnant flight attendants from continuing to fly.

8.

The Commissioner also ordered TWA to provide "accrued sick leave benefits to female employees for preg-

nancy-connected disabilities to the same extent it provides such benefits to employees for other types of temporary physical disability." As of the date of the Commissioner's Order, TWA was already providing such benefits and continues to provide such benefits as of the date of this Appeal. Therefore, any controversy surrounding Paragraph 4 of the Commissioner's Order is moot and consequently, while TWA does not agree with those findings, it may not present those issues in the confines of this Appeal.

9.

On July 12, 1979, TWA appealed to the State Human Rights Appeal Board from the Commissioner's Order which found that TWA's requirement that flight attendants begin maternity leaves immediately upon knowledge of pregnancy violated the HRL and which ordered TWA to adopt a substitute policy.

10.

On February 15, 1980, argument was held before the Honorable Richard Wong of the New York State Human Rights Appeal Board. Although counsel for TWA was present, no one from the Division made an appearance.

11.

On March 12, 1981, the State Human Rights Appeal Board issued its Order affirming the Order of the Commissioner of the State Division of Human Rights. Similar to the Commissioner, the Appeal Board in its Order failed to consider the jurisdictional and Constitutional arguments properly raised by TWA.

12.

It is from the Order of the State Human Rights Appeal Board affirming the Order of the State Division of Human Rights that this appeal is brought.

13.

The Order of the State Division of Human Rights as affirmed by the State Human Rights Appeal Board should be vacated and annulled because TWA has been denied its right to due process under the Fourteenth Amendment of the United States Constitution in that, among other reasons, it was denied a fair and impartial hearing.

14.

The Order of the State Division of Human Rights as affirmed by the State Human Rights Appeal Board should be vacated and annulled because the Division lacks jurisdiction to modify TWA's maternity leave policy because the issues in this case concern interstate airline safety, an area in which the State of New York and its agencies may not regulate. It is TWA's position that state regulation in this area would constitute an unconstitutional burden on interstate commerce; that the policy ordered in the case presents a direct conflict with federal mandates applicable to TWA, and therefore is void under the Supremacy Clause of the United States Constitution; that any state regulation in the field of airline safety is invalid because Congress has preempted the field for federal regulation; and, that since the policy in question here has been embodied in a negotiated labor contract, state alteration of that policy is preempted by the Railway Labor Act.

15.

The Order of the State Division of Human Rights as affirmed by the State Human Rights Appeal Board should be vacated and annulled because the Commissioner's Order is not supported by substantial or sufficient evidence and because the overwhelming weight of evidence supports TWA's position that its flight attendant maternity leave policy is a necessity to TWA's business.

WHEREFORE, TWA respectfully requests that this Court vacate and annul the Order of the State Division of Human Rights as affirmed by the State Human Rights Appeal Board and for such other and further relief as is just and proper with the costs and disbursements of this proceeding.

Respectfully submitted,

By: /s/ Roger H. Schnapp
ROGER H. SCHNAPP, ESQ.
Attorney for Petitioner-
Appellant

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Order of Supreme Court of the State of New York, Appellate Division, First Department, October 7, 1982

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 7, 1982.

Present—Hon. Francis T. Murphy, Jr., Presiding Justice
David Ross
Arthur Markewich
Max Bloom
Sidney H. Asch, Justices.

14606

[M-2548]

TRANS WORLD AIRLINES, INC.,
Petitioner,

- against -

THE STATE HUMAN RIGHTS APPEAL BOARD and THE STATE DIVISION OF HUMAN RIGHTS,
Respondents.

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Section 298 of the Executive Law and Article 78 of the Civil Practice Law and Rules, setting aside and annulling the order of the State Human Rights Appeal Board dated March 12, 1981, which affirmed the determination and order of the State Division of Human Rights dated June 27, 1979 which, *inter alia*, refused to dismiss and

determined that TWA's requirement that flight attendant's begin maternity leave upon knowledge of pregnancy violated the New York Human Right Law,

And said proceeding having been argued by Richard E. Rieder of counsel for petitioner, by Ann Thacher Anderson of counsel for respondents, and a brief as amicus curiae having been submitted by Scott A. Raisher of counsel for The Independent Federation of Flight Attendants; and due deliberation having been had thereon,

It is unanimously ordered that the order of the State Human Rights Appeal Board be and the same hereby is confirmed, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Notice of Appeal to Court of Appeals of the State of New York, November 4, 1982

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION FIRST DEPARTMENT

Index No. 14606
[M-2548]

TRANS WORLD AIRLINES, INC.,
Petitioner-Appellant,

- against -

STATE HUMAN RIGHTS APPEAL BOARD and the STATE DIVISION OF HUMAN RIGHTS,
Respondents-Respondents.

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that the above-named Petitioner-Appellant Trans World Airlines, Inc., pursuant to CPLR 5601(b)(1), hereby appeals to the Court of Appeals from an order of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division on October 7, 1982, which order unanimously confirmed the order of the State Human Rights Appeal Board entered on March 12, 1981, and which order finally determined this proceeding, in which there

is directly involved the construction of the provisions of Article I, Section 8, Clause 3, and Article VI, Clause 2, of the Constitution of the United States, and Petitioner-Appellant Trans World Airlines, Inc. appeals from each and every part of said order of the Appellate Division as well as from the whole thereof.

New York, New York
November 4, 1982

KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043

and

NITKIN ALKALAY HANDLER
& ROBBINS
122 East 42nd Street
New York, New York 10168

Attorneys for Petitioner-
Appellant Trans World
Airlines, Inc.

TO: CLERK OF THE APPELLATE
DIVISION: FIRST DEPARTMENT

CAROLINE DOWNEY, ESQ.
Attorney for Respondents-Respondents
State Division of Human Rights
Two World Trade Center
New York, New York 10047

Motion to Dismiss Appeal,
November 18, 1982

COURT OF APPEALS
STATE OF NEW YORK

TRANS WORLD AIRLINES, INC.,
Petitioner-Appellant,
- against -
STATE HUMAN RIGHTS APPEAL BOARD and the
STATE DIVISION OF HUMAN RIGHTS,
Respondents-Respondents.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affirmation of Ann Thacher Anderson, dated November 18, 1982 and the record of this proceeding, the undersigned will move this Court at a motion term to be held at Court of Appeals Hall, Eagle Street, Albany, N.Y. on November 29, 1982 at 2 P.M. or as soon thereafter as counsel can be heard (1) for an order dismissing this appeal, taken as of right pursuant to Section 5601(b)(1) of the Civil Practice Law and Rules, because this is not a case in which there is directly involved the construction of the Constitution of the State or of the United States, (2) for such other further relief as to this Court may seem just and proper.

Dated: New York, N.Y.
November 18, 1982

Yours etc.
ANN THACHER ANDERSON
General Counsel
Attorney for Respondents-Respondents
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047
212/488-7650

Affirmation in Support of Motion to Dismiss Appeal, November 18, 1982

COURT OF APPEALS
STATE OF NEW YORK

TRANS WORLD AIRLINES, INC.,
Petitioner-Appellant,

- against -

STATE HUMAN RIGHTS APPEAL BOARD and the STATE DIVISION OF HUMAN RIGHTS,
Respondents-Respondents.

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS APPEAL

Ann Thacher Anderson, an attorney admitted to practice in the State of New York, and General Counsel to the State Division of Human Rights, one of the respondents-respondents herein, affirms, subject to the penalties for perjury:

1. The Division seeks an order of this Court dismissing this appeal, which has been taken as of right pursuant to Section 5601(b)(1) of the Civil Practice Law and Rules, because this is not a case in which there is directly involved the construction of the Constitution of the State or of the United States.

2. The decision appealed from, which is not yet officially reported but appears at N.Y.L.J. Nov. 12, 1982 p. 6 col. 1, sustains, pursuant to Section 298 of the Hu-

man Rights Law, a certain order issued by the State Human Rights Appeal Board on March 12, 1981, which affirms an order issued by the Division on June 27, 1979.

3. The Division's order finds that TWA discriminates as to sex in terms, conditions and privileges of employment by compelling every flight attendant to take a mandatory unpaid leave as soon as she learns she is pregnant, without regard to her ability to perform the duties of her job, and by disallowing, to employees who become actually disabled in some way connected with pregnancy, fringe benefits provided by TWA to employees disabled by nonoccupational injury or illness.

4. TWA urged in its petition and briefing to the court below that the order of the Appeal Board should be vacated because the Division's hearing denied TWA due process, because the Division lacks jurisdiction to direct changes in TWA's maternity leave policy, because state regulation would burden interstate commerce, because the Division's order would conflict with federal mandates and is therefore void under the Supremacy Clause, and is preempted by federal airline safety regulation and by federal labor law doctrine, and because the Division's order lacks appropriate evidentiary support. Petition ¶¶ 13-15.

5. The Appellate Division unanimously sustained the orders on review, without opinion.

6. The Division submits that notwithstanding the efforts of TWA to present and preserve questions under the Constitution of the United States, this proceeding does not directly involve the construction of that Constitution or any of its provisions.

a. The claim that the Division denied TWA due process, if not so clearly refuted by the record, would present a question of fact rather than construction of the Fourteenth Amendment.

b. The claim that the Division's order would burden interstate commerce, adjudicated unfavorably to TWA's position in *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963), does not raise directly the construction of the Commerce Clause, U.S. Const. Art. I § 8, but only ancillary questions as to the effect of the order and its interrelationship with existing requirements of Sections 701(K) and 708 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-(k), 2000e-7, as amended P.L. 95-555; see also § 2000h-4.

c. The claims of conflict with Federal mandates, preemption by federal airline safety regulation, and preemption by federal labor law doctrine, present at most a question of statutory, not constitutional, construction.

7. The Division submits one copy of its brief to the Appellate Division.

WHEREFORE, no question of constitutional construction being directly involved, the appeal should be dismissed.

Dated: New York, N.Y.
November 18, 1982

/s/ Ann Thacher Anderson

Order of Court of Appeals of the State of New York, Granting Motion to Dismiss Appeal, December 15, 1982

COURT OF APPEALS
OF THE STATE OF NEW YORK

Mo. No. 1215

IN THE MATTER OF TRANS WORLD AIRLINES, INC.,
Appellant,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and the
STATE DIVISION OF HUMAN RIGHTS,
Respondents.

DECISION COURT OF APPEALS

Motion to dismiss appeal granted and appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

Motion for Reargument, or in the Alternative, for Leave to Appeal, January 17, 1983

COURT OF APPEALS
OF THE STATE OF NEW YORK

Supreme Court, Appellate Division Index No. 14606
[M-2548]

TRANS WORLD AIRLINES, INC.,
Appellant,

- against -

STATE HUMAN RIGHTS APPEAL BOARD and the STATE DIVISION OF HUMAN RIGHTS,
Respondents.

NOTICE OF MOTION FOR REARGUMENT,
OR IN THE ALTERNATIVE,
FOR LEAVE TO APPEAL

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of William H. Boice, sworn to the 17th day of January, 1983; the Order of the Commissioner of the State Division of Human Rights, issued on June 27, 1979; the Order of the State Human Rights Appeal Board affirming said Order and issued on March 12, 1981; the Order of the Appellate Division, First Department unanimously affirming said Order and entered in the Office of the Clerk of the Appellate Division, First Department on October 7, 1982; the Order of the Court of Appeals dismissing Appellant's appeal as of right and issued on De-

cember 15, 1982; the record on appeal to said Appellate Division and the briefs filed therein; the brief of Appellant submitted herewith, and upon all the proceedings heretofore had herein, the Appellant will move this Court at a stated term thereof, appointed to be held at the Court House of the Court of Appeals in the City of Albany, State of New York, on the 31st day of January, 1983, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for reargument of Appellant's appeal as of right and upon such reargument for an order reversing the aforesaid Order of this Court upon the ground that the Points specified in the Brief appended hereto were overlooked or misapprehended. In the alternative, Appellant will move for an order allowing an appeal to be taken herein by the Appellant to this Court from said Order of affirmance, pursuant to CPLR 5602(a)(1)(i), and for such other and further relief as may be just and proper.

The grounds upon which such leave is asked are set forth in detail in the attached brief and, conscisely stated, are as follows:

1. That questions of law are raised herewith which are questions of vital public importance, to wit:

   (a) whether the Division's attempted regulation of an airline safety policy places a burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, cl. 3; and

   (b) whether an order invalidating Appellant's maternity policy conflicts with federal safety duties, infringes on an area preempted by federal law, and therefore violates the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2;

2. That these questions of law are of substantial importance to interstate air carriers with similar policies throughout the nation and the world;

3. That the said questions of law have not been passed upon by this Court; and

4. That such appeal is required in the interests of substantial justice.

Dated: January 17, 1983.

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NITKIN, ALKALAY, HANDLER
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Attorneys for Appellant
Trans World Airlines, Inc.

TO: CAROLYN DOWNEY, ESQ.
State Division of Human Rights
Two World Trade Center
New York, New York 10047

Attorney for Respondent

Affidavit in Support of Motion for Reargument, or in the Alternative, for Leave to Appeal, January 17, 1983

COURT OF APPEALS
OF THE STATE OF NEW YORK

Supreme Court, Appellate Division Index No. 14606
[M-2548]

TRANS WORLD AIRLINES, INC.,
Appellant,

- against -

STATE HUMAN RIGHTS APPEAL BOARD and the
STATE DIVISION OF HUMAN RIGHTS,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION
FOR REARGUMENT, OR IN THE ALTERNATIVE,
FOR LEAVE TO APPEAL

William H. Boice, after being duly sworn, deposes and says:

1.

I am an attorney for Trans World Airlines, Inc. (hereinafter "TWA"), Appellant in the subject Motion, and am familiar with the facts and proceedings had herein.

2.

I offer this affirmation in support of the instant Motion for Reargument, or in the Alternative, for Leave to Ap-

peal from the Order of the Appellate Division, First Department, which affirmed the Order of the State Commissioner of Human Rights, as further affirmed by the State Human Rights Appeal Board, holding that TWA's maternity leave policy violated the New York Human Rights Law, N.Y. [Exec.] 297 (McKinney 1972).

3.

The pertinent facts are contained in detail in the brief submitted herewith in support of this Motion.

4.

On December 14, 1973, the State Division of Human Rights (hereinafter the "Division") filed a Complaint on its own behalf against TWA, alleging that TWA violated the New York Human Rights Law by maintaining a policy requiring any flight attendant who learns that she is pregnant to notify TWA and immediately begin a maternity leave of absence. TWA consistently maintained that the Division lacked jurisdiction over this matter because: (1) state regulation of an airline safety policy places a burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, cl. 3; and (2) an order invalidating TWA's maternity policy would conflict with federal safety duties and impinge on an area preempted by federal law, thereby violating the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2.

5.

On June 27, 1979, without addressing TWA's constitutional arguments, the Division issued an Order requiring TWA to modify its policy of requiring flight attendants to discontinue flying while pregnant. A copy of this Order is attached hereto as Exhibit "A".

6.

The Order of the Division was affirmed by Order of the State Human Rights Appeal Board on March 12, 1981. A copy of this Order is attached hereto as Exhibit "B".

7.

On October 7, 1982, the Appellate Division, First Department, issued an Order without opinion unanimously confirming the Order of the State Human Rights Appeal Board. A copy of this Order is attached hereto as Exhibit "C".

8.

On November 5, 1982, TWA appealed the Appellate Division's Order as of right to the New York Court of Appeals, on the grounds that substantial constitutional issues were directly involved in the case below.

9.

On December 15, 1982, the Court of Appeals dismissed the appeal as of right on the grounds that no substantial constitutional issues were directly involved. The Court issued no opinion with its dismissal.

10.

No previous motion has been made to this Court for permission to appeal.

11.

No application has been made to the Appellate Division, First Department, for permission to appeal to this Court.

12.

For the reasons which appear in the Notice of Motion and in the brief herewith submitted, I respectfully request that reargument on the appeal as of right be

granted, or in the alternative, that leave to appeal to the Court of Appeals be granted in accordance with the provisions of CPLR 5602(a)(1)(i), and for such other and further relief as to this Court may seem just and proper.

/s/ William H. Boice
WILLIAM H. BOICE
KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043
(404) 572-6500

Subscribed and sworn to
before me this 17th day of
January, 1983.

/s/ Rebecca Flury
Notary Public Georgia, State at Large
My Commission Expires Sept. 9, 1985

Order of Court of Appeals of the State of New York, Denying Motion for Reargument, or in the Alternative, for Leave to Appeal, February 23, 1983

COURT OF APPEALS
OF THE STATE OF NEW YORK

Mo. No. 104

IN THE MATTER OF TRANS WORLD AIRLINES, INC.,
Appellant,

vs.

STATE HUMAN RIGHTS APPEAL BOARD and the
STATE DIVISION OF HUMAN RIGHTS,
Respondents.

DECISION COURT OF APPEALS

Motion for vacatur of dismissal order of December 15, 1982 or, alternatively, for leave to appeal, denied in each respect.

Notice of Appeal to the Supreme Court of the United States, Received in the Court of Appeals May 18, 1983, and in the Supreme Court, Appellate Division, May 19, 1983

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Mo. No. 104

TRANS WORLD AIRLINES, INC.,
v. *Appellant,*

NEW YORK HUMAN RIGHTS APPEAL BOARD and the NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Appellees,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Trans World Airlines, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, entered on February 23, 1983, denying appellant's motion for reargument of this Court's dismissal of appellant's appeal or, in the alternative, for leave to appeal.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: May 18, 1983.

GORDON DEAN BOOTH

WILLIAM B. BOICE
Attorneys for Appellant

Of Counsel:
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No. 82-1899

IN THE

Supreme Court of the United States

October Term, 1982

TRANS WORLD AIRLINES, INC.,

Appellant,

v.

THE NEW YORK STATE HUMAN RIGHTS APPEAL BOARD and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Appellees.

MOTION TO DISMISS OR AFFIRM

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ANN THACHER ANDERSON
Of Counsel

Restatement of Question Presented

Has TWA presented a substantial federal question under the Commerce Clause, the Supremacy Clause or the Due Process Clause of the Fourteenth Amendment?

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No. 82-1899

IN THE

Supreme Court of the United States

October Term, 1982

TRANS WORLD AIRLINES, INC.,

Appellant,

v.

THE NEW YORK STATE HUMAN RIGHTS APPEAL BOARD and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellee New York State Division of Human Rights moves the Court to dismiss this appeal or affirm summarily the several orders below, because TWA has presented no substantial federal question.

Statutes Involved

1. 28 U.S.C. § 1257 provides in relevant part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being

repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

2. The provisions of the Human Rights Law, N.Y. Exec. Law Art. 15 (McKinney's 1972 & Supp.), relevant to the question TWA seeks to raise are set forth in the Jurisdictional Statement at 6.

3. The constitutional and statutory provisions on which TWA relies are set forth in the Jurisdictional Statement at 3ff.

Statement of the Case

The several orders on appeal to this Court, see Jurisdictional Statement at 1n, (1) uphold administrative orders issued by the appellees finding that TWA discriminated against its female flight attendants because of sex, in violation of the Human Rights Law, by compelling them to take unpaid leave immediately upon notification of pregnancy, 90 App. Div.2d 699 (2nd Dept. 1982) (30a)*; (2) dismiss TWA's appeal as of right to the New York Court of Appeals on the ground that no substantial constitutional question was directly involved, 58 N.Y.2d 778 (1983) (38a), and (3) deny TWA's subsequent motion for reargument or leave to appeal, 58 N.Y.2d 970 (1983) (46a).

The first administrative order was issued by appellee New York State Division of Human Rights (13a) after written notice and extensive public hearings. The second administrative order (20a) was issued by appellee New York State Human Rights Appeal Board after notice, briefing and oral argument.

* Page numbers followed by "a" refer to the Appendix to the Jurisdictional Statement.

ARGUMENT

TWA has not raised a substantial federal question.

1. *Commerce Clause; Supremacy Clause.* TWA argues that because Congress has occupied the field of air safety, the Human Rights Law is invalid under the Commerce Clause, U.S. Const. Art. I § 8, and preempted by the Federal Aviation Act, 49 U.S.C. § 1508(a) (1976), and cannot be applied to protect pregnant flight attendants from discrimination.

The argument is no longer tenable. This Court has rejected the view that application to air carriers of state laws against discrimination is invalid under the Commerce Clause or the Federal Aviation Act. *Colorado Anti-Discrimination Comm.* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963). The question has therefore been settled and now lacks substance.

Moreover, the question may now be moot. Congress has recognized and preserved state laws against discrimination by requiring recourse to administrative remedies thereunder. 42 U.S.C. §§ 2000e-5, 2000e-7; see § 2000h-4; see also *Shaw* v. *Delta Air Lines, Inc.*, —— U.S. ——, 51 U.S.L.W. 4968, 4972 (1983) and cases there cited. As amended by the Pregnancy Discrimination Act, P.L. 95-555, 42 U.S.C. § 2000e-(k), effective October 31, 1978, before issuance of the earliest order in this case, Title VII of the Civil Rights Act of 1964 imposes substantially the same prohibitions and requirements as the Human Rights Law. Neither the Human Rights Law nor any order in this case demands more of TWA than presently applicable federal law, which in New York is enforceable initially by proceedings under

the Human Rights Law. See 42 U.S.C. § 2000e-5; see also 29 C.F.R. § 1604.10 and Appendix ¶¶ 6, 8 (1979).

2. *Due Process Clause.* TWA argues that despite notice and extensive hearings, including opportunity to call, examine and cross-examine witnesses, submit evidence and make written and oral argument, see N.Y. Exec. Law § 297.4; 9 N.Y.C.R.R. § 465.10 (1977), it was deprived of due process of law, U.S. Const. Amend. XIV, because none of the orders in this case, administrative or judicial, discussed its evidence or arguments. Jurisdictional Statement at 27ff.

Although the Human Rights Law requires only findings of fact, HRL § 297.4(c), the Division's order added a short opinion addressing TWA's main arguments succinctly (15a-16a). The order meets and exceeds the statutory standard, refuting the claim that due process was somehow violated.

The mere fact that the Division's trial attorney did not file a brief in opposition neither suggests TWA's evidence or arguments were overlooked, nor exalts those arguments into binding rules of law.

Before the date of the order of the Division in this case, a similar order in a similar case had been judicially sustained. *United Air Lines, Inc.* v. *State Human Rights Appeal Board,* 61 App. Div.2d 1010 (2nd Dept.), *appeal denied,* 44 N.Y.2d 648, *cert. denied,* 439 U.S. 982 (1978). The Division did not deprive TWA of due process of law by applying that precedent here.

Conclusion

The appeal should be dismissed or the decisions below summarily affirmed.

Dated: New York, N.Y.
July 22, 1983

Respectfully submitted,

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ANN THACHER ANDERSON
Of Counsel

No. 82-1899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
Appellant,

v.

THE NEW YORK STATE HUMAN RIGHTS APPEAL BOARD and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Appellees.

On Appeal from the Court of Appeals of the State of New York

REPLY OF APPELLANT TRANS WORLD AIRLINES, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1899

TRANS WORLD AIRLINES, INC.,
Appellant,

v.

THE NEW YORK STATE HUMAN RIGHTS APPEAL BOARD and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Appellees.

On Appeal from the Court of Appeals of the State of New York

REPLY OF APPELLANT TRANS WORLD AIRLINES, INC.

Appellant, Trans World Airlines, Inc. (hereinafter "TWA"), herein responds to Appellees' Motion to Dismiss or Affirm and to the brief submitted by the Solicitor General for the United States as Amicus Curiae in support of Appellees' motion. TWA does not believe that anything contained in Appellees' two page argument in support of their motion warrants any response in addition to the arguments contained in TWA's Jurisdictional Statement. Accordingly, this Reply Brief will only address those arguments set forth in the Solicitor General's brief.

ARGUMENT

The Solicitor General's Misstatement of the Issue

Initially, it must be pointed out that the Solicitor General has misstated the question presented by this appeal. TWA *does not* contend that the New York Human Rights Law, N.Y. Exec. Law § 296.1 (McKinney 1972 & Supp. 1980-81), is preempted or invalid "to the extent that it applies to flight attendants employed by interstate air carriers."[1] TWA's contention before this Court is that New York law is preempted or invalid only to the extent that it may be interpreted to require an alteration or abandonment of a policy adopted by an interstate air carrier solely for flight safety reasons. TWA *does not* here challenge the general applicability of the pregnancy discrimination provisions of New York's Human Rights Law as they might apply to TWA's employment relationship with its flight attendants in that state. TWA *does* contend that an application of New York's Human Rights Law to require the alteration or abandonment of an *admitted* flight safety rule: (i) encroaches upon a regulatory field occupied and preempted for exclusive federal control; (ii) conflicts with TWA's federal duty to conduct its operations with the highest possible degree of safety; and (iii) places an unconstitutional burden on interstate commerce.[2]

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[1] Brief for the United States as Amicus Curiae (hereinafter "Solicitor General's Brief") at I. That issue was resolved in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963). An issue similar to the one in this appeal would have been present in that case if Colorado law had been interpreted so as to require Continental to abandon certain of its non-FAA required pilot safety requirements on the ground that they had a disparate impact on black pilots. Such an issue was neither addressed nor decided in *Colorado Anti-Discrimination Comm'n.* Indeed, the Solicitor General's misstatement of the issue here helps explain his reliance on that inapposite case.

[2] TWA also contends that the proceedings below operated to deny it due process of law in violation of the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV, § 1. The

The Preemption Claims

For reasons that are unclear, the Solicitor General never directly addresses the essential points made by TWA with respect to the preemption issues. For example, the Solicitor General never specifically takes a position on whether the field of air carrier flight safety has been preempted by congressional action for exclusive federal regulation. While the Solicitor General is careful not to specifically disavow preemption of the field of in-flight safety, his arguments amount to exactly that. The gist of his position is that there is no preemption here because the FAA has not "thus far" elected to regulate the specific subject matter involved in this case. (Solicitor General's Brief at 7). The clear implication is that at least until the FAA specifically regulates on a matter of air safety then the states are free to do so. But whether the FAA has adopted specific standards for pregnant flight attendants begs the question whether such standards are within a field reserved by Congress for exclusive federal control—the issue presented by this appeal.

As demonstrated more fully in TWA's Jurisdictional Statement (J.S. at 14-19), the paramount federal interest in facilitating unencumbered interstate travel by maintaining uniform regulation of interstate air carriers, coupled with the pervasiveness of the federal regulatory scheme, makes it clear that Congress intended to totally preempt and occupy the field of interstate air safety to the exclusion of state action. New York's attempted regulation of TWA's maternity leave policy for flight attendants encroaches upon this regulatory field and presents substantial federal questions for decision by this Court.

The Solicitor General's emphasis on the absence of specific FAA standards for pregnant flight attendants totally ignores the federal safety obligations imposed on TWA not through the FAA, but directly by federal stat-

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Solicitor General takes no position on this issue. Solicitor General's Brief at 13 n.9.

ute. Nowhere in the Solicitor General's Brief is any reference made to the duty resting upon air carriers to perform their services "with the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b) (1976); *see also* 49 U.S.C. §§ 1302(a)(1), (2), 1303(a), 1348(a), (c), 1424(a), (b) (1976). Although this duty is at the very heart of the "federal air safety regulatory scheme currently in effect," the Solicitor General fails to acknowledge that it is even a part of that scheme at all.

The Solicitor General makes no mention of the fact that TWA is under a federal duty to institute safety policies in addition to FAA *minimums*. Indeed, the entire thrust of Section 601 of the Federal Aviation Act[3] is that FAA rules and regulations are *minimums* for air carriers and are not designed to supplant but rather to supplement the "duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b).[4]

The Solicitor General demonstrates a similar misapprehension of the issues by stating that the resolution of the flight attendant-pregnancy question is "peripheral" to flight safety.[5] A brief examination of the court deci-

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[3] 49 U.S.C. § 1421 (the federal statute authorizing and requiring the Administrator of the Federal Aviation Administration to promulgate rules and regulations).

[4] TWA also maintains that the application of New York's HRL to require a modification of its maternity leave policy for flight attendants creates a direct substantive conflict with TWA's federal safety obligations and is thus preempted. (J.S. at 19-23). Inasmuch as the Solicitor General totally ignores TWA's federal statutory obligations, it is not surprising that he also fails to address the direct conflict issue.

[5] The Solicitor General's citation to *Airline Pilots Association v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983) and *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) also indicates the degree to which he has misapprehended the issues presented in this appeal. These cases involved employer-instituted flight safety rules not specifically required by any FAA regulation and an attack on those rules by plaintiffs asserting federal rights

sions which have dealt with the flight attendant pregnancy question shows this statement to be wholly untenable. As noted in TWA's Jurisdictional Statement, several courts have agreed with TWA's position that federal air safety obligations require leave upon first knowledge of pregnancy, while other decisions have found that safety does not require a blanket rule until the 13th, 20th or 26th week of pregnancy. (J.S. at 12 & 13 n.3). But every one of these decisions has held that, for the flight attendant position, unlike other jobs, a blanket mandatory maternity leave policy is justified *at some point in pregnancy*, notwithstanding the absence of specific FAA regulation on the subject. While there are disagreements as to when this point is reached, everyone agrees that at some point individualized treatment of pregnant flight attendants is unsafe and that a line must be drawn. Although the issue presented in this appeal is not about where that line should be drawn but rather about who may draw it, to say that the resolution of either question is "peripheral" to air safety is simply indefensible.

In essence, the Solicitor General argues that except in areas of specific FAA rulemaking, the field of inflight safety is open to concurrent regulation on both the federal and state levels. TWA respectfully submits that the Solicitor General's position is not only irreconcilable with the congressional scheme, but that it is both shortsighted and dangerous. While interstate air carriers and the FAA are charged by federal law with a duty to acquire and exercise expertize in the highly specialized area of

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under the *federal* Age Discrimination in Employment Act of 1967. 29 U.S.C. §§ 621-34 (1976) Neither case involved any state laws and the courts were simply required to reconcile arguably conflicting federal duties under well-developed rules of statutory construction. TWA does not contend that the Federal Aviation Act preempts the field of flight safety to the exclusion of other federal legislation but only that it preempts the field for federal regulation of whatever kind. The cases cited by the Solicitor General simply have nothing to do with the issue here and his reliance upon them is puzzling.

flight safety, the same cannot be said of state agencies such as the New York State Division of Human Rights. As the Division's cavalier treatment of the safety evidence and issues below amply demonstrates,[6] it is simply unfit to promulgate safety rules for the airline industry and Congress could not have intended for it to do so.

The Commerce Clause Claim

No less puzzling than his position on federal preemption is the Solicitor General's attack on TWA's Commerce Clause claim. (*See* J.S. at 23-27). Although he attempts to show that there is no real potential for conflicting state regulation, his argument lacks internal consistency. On the one hand, the Solicitor General argues that a state, in the exercise of its traditional police powers, may require an interstate air carrier to abandon or modify air safety policies under the guise of regulating employment discrimination. He later argues that another state, in the exercise of that same police power, may not require an air carrier to adopt a similar policy for safety reasons. (*See* Solicitor General's Brief at 11 n.6). No reason is offered for this distinction and no valid reason is apparent.[7] A state's use of its police power to impose safety measures on common carriers is at least as widely recognized as a state's use of its police power to outlaw safety measures for a different reason. Moreover, the Solicitor General's suggestion that TWA could avoid problems with conflicting state laws by "complying with the

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[6] *See* J.S. at 27-32.

[7] The Solicitor General apparently assumes that a hypothetical California law requiring leave upon first knowledge of pregnancy would be in conflict with the pregnancy discrimination provisions of Title VII. *See* 42 U.S.C. 2000e(k) (Supp. V 1981). But he offers no authority for this assumption and there appears to be none in light of the decisions in *Harris v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) and *Air Line Pilots Association v. Western Air Lines, Inc.*, No. 80-4043 (9th Cir. July 16, 1983), each of which arose out of flight operations in the State of California and held that mandatory leave for flight attendants upon first knowledge of pregnancy did not violate Title VII.

most stringent requirement," simply misses the point that this is no solution when the requirements run in opposite directions.

Finally, the Solicitor General asserts that since "varying results in Title VII cases apparently have not imposed intolerable burdens on interstate air commerce," differing state law requirements should not do so either. (Solicitor General's Brief at 12-13). This assertion demonstrates a misunderstanding of both the way in which interstate air carriers operate and the legal effect of the orders in the referenced Title VII cases. The diverse results reached in the Title VII cases apply to different air carriers, not to different jurisdictions in which a single air carrier operates. No air carrier has been ordered in any Title VII case to institute a different maternity leave cutoff date for flight attendants in the different states in which it operates. Such a result could only occur if different states were allowed to impose different cutoff dates for the same airline, and it is precisely the threat of this result which TWA contends would place an intolerable burden on interstate commerce.

In sum, there is a real and substantial possibility that TWA could face conflicting regulations with regard to the timing of maternity leave for flight attendants. Under these circumstances, New York's attempted regulation of TWA's policy is prohibited by the Commerce Clause. U.S. Const. art I, § 8, cl. 3.

Respectfully submitted,

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No. 82-1899

In the Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC., APPELLANT

v.

NEW YORK STATE HUMAN RIGHTS APPEAL BOARD, ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a New York statute prohibiting employment discrimination on the basis of pregnancy is preempted by the Federal Aviation Act of 1958, 49 U.S.C. (& Supp. V) 1301 *et seq.*, or invalid under the Commerce Clause to the extent that it applies to flight attendants employed by interstate air carriers.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

The Human Rights Law of the State of New York makes it unlawful for an employer "to discriminate against any * * * individual in compensation or in terms, conditions or privileges of employment" on the basis of sex (N.Y. Exec. Law § 296.1 (McKinney 1982)). The statute encompasses discrimination based on pregnancy. See *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S. 884 (1976); *State Division of Human Rights* v. *City School District*, 75 A.D.2d 1009, 429 N.Y.S.2d 322 (1980). On De-

cember 14, 1973, appellee New York State Division of Human Rights (the State Division) issued a complaint charging appellant, Trans World Airlines, Inc. (TWA),[1] with violating Section 296.1 of the Human Rights Law by virtue of its policies of (1) compelling all female flight attendants to go on disability leave at the onset of pregnancy without regard to their ability to perform their duties, and (2) denying pregnant flight attendants the disability pay, insurance, and other benefits provided to other TWA employees on leave due to non-pregnancy-related disabilities. J.S. App. 1a-3a, 9a, 14a.[2]

After TWA unsuccessfully moved to dismiss the complaint on a variety of grounds, administrative hearings on the merits were held on various dates

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[1] The Human Rights Law is applicable to employers residing, incorporated or authorized to do business within the State of New York and employing four or more persons within the State of New York (N.Y. Exec. Law §§ 292.5, 298-a (McKinney 1982)). The Human Rights Law reaches violations committed outside of the State of New York against New York residents by such employers, but potential sanctions in such cases vary significantly depending on whether the employer resides or is incorporated in New York, or is merely authorized to do business within the State. See N.Y. Exec. Law § 298-a(1) and (3) (McKinney 1982).

[2] The benefits issue is not before this Court. The Pregnancy Discrimination Act, 42 U.S.C. (Supp. V) 2000e(k), prohibits TWA from discriminating in the payment of benefits "on the basis of pregnancy, childbirth, or related medical conditions." TWA has advised the Court that it has altered its prior policies relating to benefits to bring itself into compliance with the Pregnancy Discrimination Act. See J.S. 6-7 n.4. Any issues relating to the payment of benefits for periods prior to passage of the Pregnancy Discrimination Act would be governed by this Court's decision in *Shaw* v. *Delta Air Lines, Inc.*, No. 81-1578 (June 24, 1983).

between November 24, 1975 and September 28, 1978 (J.S. App. 9a). At the hearings, TWA introduced medical opinion evidence to support its contention that placing flight attendants on leave status at the very onset of pregnancy and until term was reasonably necessary in view of applicable health and air safety considerations (J.S. 9-10). By stipulation of the parties, the State Division introduced into the record the medical testimony offered by Dr. Andre Hellegers in a similar case then pending before it, *Rosenfeld* v. *United Airlines, Inc.*, No. CS-32898-74 (J.S. App. 10a, 16a). Dr. Hellegers testified that a blanket mandatory leave policy for pregnant flight attendants was not medically justifiable (J.S. App. 15a).

The *Rosenfeld* case was decided before the first level of administrative proceedings was concluded in this case.[3] By recommended findings of fact, decision and order entered on May 23, 1979 (J.S. App. 8a-12a), the administrative law judge determined that TWA's policies violated Section 296.1 of the Human Rights Law and ordered TWA to implement, in their stead, the policies ordered by the New York State Human Rights Appeal Board in *Rosenfeld*. Under *Rosenfeld*, the airline (1) must permit pregnant flight attendants to work until their 20th week of pregnancy provided that, if requested to do so by the airline, the flight attendants obtain a semi-monthly medical authorization from their personal physician;

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[3] *Rosenfeld* v. *United Airlines, Inc.*, No. CS-32898-74 (Sept. 10, 1975), aff'd, App. Nos. 3558 & 3065, confirmed *sub nom. United Air Lines, Inc.* v. *State Human Rights Appeal Board*, 61 A.D.2d 1010, 402 N.Y.S.2d 630, motion for leave to appeal denied, 44 N.Y.2d 648, cert. denied, 439 U.S. 982 (1978).

(2) may disqualify a flight attendant from further flight duty from the 20th to the 28th week of pregnancy should it perceive, on the basis of its own medical examination, a risk to the employee's health or to the safety of the passengers or crew; and (3) may disqualify a flight attendant from further duty in its discretion and without regard to the physical condition of the individual flight attendant during and after the 28th week of pregnancy (J.S. App. 11a). The administrative law judge rejected TWA's argument that application of the Human Rights Law to interstate air carriers was preempted by federal air safety laws, stating that the same constitutional claim previously had "been considered and rejected by the [New York] Courts" (*id.* at 10a) (citations omitted).

The findings and conclusions of the administrative law judge were reiterated and affirmed by the Commissioner of the State Division (J.S. App. 13a-18a). TWA then appealed the Commissioner's order to the New York State Human Rights Appeal Board. In addition to its preemption argument, TWA argued that the failure of the administrative decisions specifically to address TWA's medical evidence demonstrated that the result in the case had been "predetermined" and that TWA had been denied due process of law (J.S. 11). Employing a substantial evidence standard of review, the Appeal Board affirmed the Commissioner's decision on March 12, 1981 (J.S. App. 20a-21a). TWA then sought review in the Supreme Court of the State of New York, repeating its prior contentions and additionally arguing that application of the Human Rights Law to its flight attendants imposed an impermissible burden on interstate commerce (*id.* at 24a-29a). The Appeal Board's decision was confirmed by a unanimous

order of the Supreme Court of the State of New York (*id.* at 30a-31a), and TWA appealed to the Court of Appeals of the State of New York. That court dismissed TWA's appeal as of right on December 15, 1982, on "the ground that no substantial constitutional question is directly involved" (*id.* at 38a), and on February 23, 1983, it denied TWA's alternative motion for reargument or discretionary leave to appeal (*id.* at 46a).

DISCUSSION

Neither TWA's preemption claim nor its Commerce Clause claim presents a substantial constitutional question. The decision below does not conflict in fact or in principle with any decision of this Court or of any other court, and plenary review by this Court is not warranted.

1. TWA's principal contention (J.S. 12-23) is that the application to interstate air carriers of the sex discrimination provisions of New York's Human Rights Law is preempted by Congress's "occupation of the air safety field" through passage of the Federal Aviation Act of 1958, 49 U.S.C. (& Supp. V) 1301 *et seq.* Although Congress has indeed legislated extensively in the field of air safety, no federal interest is harmed or affected by the application of the anti-discrimination provisions of the Human Rights Law to interstate air carriers. We therefore agree with appellees that the Federal Aviation Act does not preempt state authority in this case.

a. The Court has recently noted that "[t]he goal of any pre-emption inquiry is 'to determine the congressional plan.'" *Rice* v. *Rehner*, No. 82-401 (July 1, 1983), slip op. 4-5, quoting *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504 (1956). In making that inquiry,

" 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress' " (*Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts" (*Jones*, 430 U.S. at 525) (citation omitted).

Accordingly, it is well settled that " 'an unexpressed purpose to nullify * * * [state power] is not lightly to be attributed to Congress' " (*California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-104 (1980), quoting *Parker* v. *Brown*, 317 U.S. 341, 351 (1943)). "Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained' " (*Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963)). And, where possible, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973), quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

It is in light of these principles that we now show that the Federal Aviation Administration's authority to regulate air safety should not be taken to preempt the states' authority to ban pregnancy-related sex discrimination against flight attendants.

b. In this instance, the State of New York has not attempted direct regulation of air safety matters but, rather, has regulated in the field of employment discrimination—an area peculiarly adapted to local regulation [4]—in a manner that only indirectly implicates questions of air safety subject to regulation by the FAA. TWA correctly observes (J.S. 15 n.10) that a state cannot evade a preemption bar in an area extensively regulated by federal law through the simple expedient of "intrud[ing] indirectly" under a state law nominally regulating a different field. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981). In this case, however, not only does the state law facially regulate local employment discrimination rather than air safety practices, but the requirements imposed by the state law are peripheral to the federal air safety regulatory scheme currently in effect and concern a subject matter that the FAA has thus far elected *not* to regulate.

Although TWA bases its preemption argument on the contention that questions involving air safety ultimately are subject to regulation by the FAA, it is constrained to acknowledge (J.S. 20-22) that the

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[4] The identical anti-discrimination requirements TWA challenges in this case on the basis of the Supremacy Clause are also imposed as a matter of federal law by the Pregnancy Discrimination Act, 42 U.S.C. (Supp. V) 2000e(k). In recognition of the importance of state anti-discrimination laws to the enforcement of Title VII of the Civil Rights Act of 1964 (of which the Pregnancy Discrimination Act is now a part), Congress expressly preserved such state laws (42 U.S.C. 2000e-7, 2000h-4) and provided for enforcement at the state level in the first instance in those cases in which employment practices made unlawful by Title VII are also prohibited under state or local law (42 U.S.C. 2000e-5(c), (d), and (e)).

Human Rights Law results in a displacement of safety-related policies established *not* by the FAA, but by TWA itself. Other courts have found essentially the same distinction to be significant in cases involving FAA regulation. See *Air Line Pilots Association* v. *Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983) (FAA rule prohibiting persons over 60 from serving as pilots on commercial aircraft carrier cannot serve to justify the application of a similar rule to flight engineers whom the FAA has exempted from the "over-60" rule); *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) (FAA's "over-60" rule does not support employer's application of a similar policy to company pilots not actually covered by the FAA rule).

The FAA does enjoy broad general authority to regulate matters affecting the safe conduct of air passenger carriage (see 49 U.S.C. 1421(b) and 1424). Pursuant to these powers, the FAA has established regulations specifying the minimum number of flight attendants required on each flight and has prescribed training requirements for flight attendants. 14 C.F.R. 121.391, 121.433. Yet none of these regulations imposes any specific physical qualifications, let alone conditions relating to pregnancy, for crew members serving as flight attendants.[5] The absence of preg-

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[5] The absence of physical qualification requirements for flight attendants is not due to any lack of statutory authority. The Secretary of Transportation is authorized "to issue airman certificates specifying the capacity in which holders thereof are authorized to serve as airmen in connection with aircraft" and to condition the issuance and continuing validity of such certificates upon, inter alia, the physical condition of the certificate holders. 49 U.S.C. 1422. The Act defines the term "airman" broadly to include "any * * * member of the

nancy-related federal regulations is intentional. Since at least March 1974 the FAA's position has been that "a pregnant woman with no complications is in good health" and that "whether a flight attendant should fly when pregnant is a matter between herself, her doctor and her employer." App., *infra*, 3a. That policy was reaffirmed by the FAA's Federal Air Surgeon in February 1977 (*id.* at 6a).

Thus, although Congress has legislated extensively in the field of air safety, TWA has failed to show that Congress intended to preempt state anti-discrimination laws that are fully compatible with the federal regulatory scheme. The Human Rights Law might conceivably threaten interference with federal regulation of air safety if, at some future point, the FAA determined that it was necessary and appropriate to establish uniform physical or medical standards for flight attendants. But "at least so long as any power [the FAA] may have" over the physical qualifications required of flight attendants "remains 'dormant and unexercised' [the Human Rights Law] will not frustrate any part of the purpose of the federal legislation" and is not preempted (*Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 724 (1963) (footnotes omitted), quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 775 (1947)).

2. TWA also argues (J.S. 23-27) that the application of New York's anti-discrimination laws to interstate air carriers imposes a constitutionally im-

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crew, in the navigation of aircraft while underway" (49 U.S.C. 1301(7)). Nevertheless, the FAA has never sought to apply physical certification requirements to flight attendants, male or female.

permissible burden on interstate commerce. The argument is not persuasive.

"A state statute must be upheld if it 'regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Edgar* v. *Mite Corp.*, 457 U.S. 624, 640 (1982), quoting *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Where, as here, such a state law is challenged solely on the ground that an interstate carrier would be unduly burdened by simultaneously having to comply with incompatible state regulations, it is ordinarily incumbent on the carrier to identify "such competing or conflicting local regulations" in the first instance. *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 448 (1960). See also *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 527-528 (1959). In this case, TWA "has pointed to none," *Huron Portland Cement Co.*, 362 U.S. at 448, but instead argues only that the New York law should be invalidated under the Commerce Clause because there is a strong "potential" that other states will in the future enact conflicting anti-discrimination laws (J.S. 23-24). TWA's claim fails even under this theory.

Continental Air Lines advanced a similar claim in its challenge to a state employment law prohibiting racial discrimination in *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963). This Court, however, flatly rejected the argument that Continental's conduct of interstate air carriage could be burdened by the potential enactment of diverse state laws; the Court's own rulings forbidding racial discrimination effectively precluded

state laws affirmatively requiring such discrimination and made the "threat of diverse and conflicting [state] regulation of hiring practices * * * virtually nonexistent" (372 U.S. at 721). So too here, state laws prohibiting discrimination on the basis of pregnancy are unlikely ever to pose irreconcilable demands on TWA. In view of the Pregnancy Discrimination Act, 42 U.S.C. (Supp. V) 2000e(k), the likelihood of any state's enacting laws affirmatively prohibiting the employment of pregnant women is "virtually nonexistent." [6]

Although it is not inconceivable that the states might at some time impose varying restrictions on a carrier's right to ground flight attendants on the basis of pregnancy, the most probable variations would concern the period during which a carrier would be authorized (although not required) to place pregnant employees on disability status without making an individualized demonstration of need. To the extent that one state might prohibit a carrier from laying-off a pregnant employee in its sole discretion for a longer period than another state, the interstate carrier could satisfy the demands of both states simply by meeting the more stringent requirement.[7]

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[6] Accordingly, TWA's hypothetical suggestion (J.S. 24) of the problems it could encounter in operating "a direct flight from New York to Los Angeles with intermediate stops in Philadelphia and Detroit" is legally impossible because, contrary to the facts posited in TWA's hypothetical, the State of Pennsylvania cannot lawfully prohibit flight attendants from flying after the 15th week of pregnancy, nor can the State of California lawfully prohibit pregnant flight attendants from flying at all.

[7] Turning again to TWA's hypothetical problems (J.S. 24), TWA could comply with both Michigan and New York law by allowing pregnant flight attendants to fly through the 30th

TWA's Commerce Clause claim is also undermined by the apparent absence of any intolerable burden on interstate commerce stemming from diverse rulings in pregnancy discrimination cases against interstate airlines under Title VII of the Civil Rights Act. As TWA acknowledges (J.S. 12-13 n.9), non-uniform rules for laying off pregnant flight attendants already have been adopted by different courts considering carrier lay-off practices under 42 U.S.C. (& Supp. V) 2000e. Compare, *e.g.*, *Harriss* v. *Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (accepting blanket policy of immediate lay-offs), with, *e.g.*, *Burwell* v. *Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980) (en banc), cert. denied, 450 U.S. 965 (1981) (rejecting blanket policy of immediate lay-offs and adopting rules similar to those adopted in this case). It is difficult to comprehend how the adoption of diverse lay-off policies by state courts enforcing virtually identical local human rights laws would be any more burdensome than the diverse lay-off policies already adopted by federal courts enforcing Title VII.[8]

The fact that varying results in Title VII cases apparently have not imposed intolerable burdens on interstate air commerce belies TWA's contention (J.S.

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week of pregnancy. Stated differently, New York law requires only that pregnant flight attendants be permitted to continue flying *at least* through the 27th week of pregnancy; it does not prohibit them from flying longer. Cf. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 463 (1969).

[8] Moreover, airlines have brought themselves into compliance with the varying court-ordered lay-off policies in precisely the manner we suggest—by complying with the most stringent requirement. See *Burwell*, 633 F.2d at 376-377 & n.4 (Butzner, J., concurring in part and dissenting in part).

24-27) that the burdens inherent in complying with diverse state laws would outweigh the states' interest in preventing discrimination against their citizens by employers incorporated, residing, or doing business within their boundaries. TWA's inability to demonstrate that New York's otherwise legitimate exercise of its police power is outweighed by the adverse impact of that exercise on interstate commerce defeats the Commerce Clause claim in and of itself. See *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 441 (1978); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. at 443.

CONCLUSION

The judgment below should be affirmed.[9]

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ROBERT S. GREENSPAN
MARK H. GALLANT
Attorneys

DECEMBER 1983

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[9] As is the case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(e), an employer is entitled under the New York Human Rights Law to prove that an otherwise prohibited discriminatory practice is justifiable as a bona fide occupational qualification reasonably necessary to the conduct of business. The United States expresses no view with respect to TWA's contention (J.S. 27-32) that it was effectively denied the opportunity in the proceedings below to present evidence to support the claim that its lay-off policy was reasonably necessary to the conduct of its business. But see Mot. to Dis. or Aff. 4.

APPENDIX

March 15, 1974

Hon. Alexander P. Butterfield
Administrator
Federal Aviation Administration
Washington, D.C. 20591

Dear Mr. Butterfield:

I am writing to you on a matter of mutual interest and concern to the Federal Aviation Administration and flight attendants.

As you probably know, there is a general policy maintained by scheduled and supplemental airlines requiring female flight attendants to discontinue flying and go on maternity leave upon knowledge of pregnancy. Recent interpretations of legislation prohibiting sex discrimination, including Title VII of the Civil Rights Act of 1964, and judicial decisions indicate that careful attention must be given at this time to reconsideration of this policy. I direct your particular attention to the decision of the United States Supreme Court in *La Fleur* v. *Board of Education*, which discusses considerations that the Court deemed relevant to a uniform requirement that employees must go on maternity leave when pregnant.

This subject raises issues as to health and air safety, and we would appreciate the cooperation of the Federal Aviation Administration in resolving these issues. We therefore request that this matter be given prompt and appropriate attention. We are ready to cooperate in this respect and would appreciate your response.

I would be happy to discuss these matters with you at your convenience.

Sincerely,

KELLY RUECK
President, Association of
Flight Attendants

KR/ps

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Washington, D.C. 20591

March 28, 1974

Ms. Kelly Rueck, President
Association of Flight Attendants
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Dear Ms. Rueck:

This is in reply to your March 15 letter concerning the general policy of some air carriers in requiring flight attendants to discontinue flying upon knowledge of pregnancy.

The Federal Aviation Administration has not set forth limits for crewmembers because of pregnancy. Basically, we feel that a pregnant woman with no complications is in good health. The consideration of whether a flight attendant should fly when pregnant is a matter between herself, her doctor and her employer. It must be remembered, however, that flight attendants when serving as a required crewmember should be able to perform all assigned tasks.

Sincerely,

/s/ C. A. McKay

C. A. MCKAY, Acting Assistant Chief
Flight Operations Division
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Telephone (202) 393-2080

December 28, 1976

H. L. Reighard, M.D.
Federal Air Surgeon
Federal Aviation Administration
Code AAM-1
Room 300E
800 Independence Avenue, S.W.
Washington, D. C. 20591

Dear Sir:

By letter of March 28, 1974, from Mr. C. A. McKay, the FAA briefly addressed the question of whether female flight attendants should be permitted to continue to work during the term of a pregnancy. This was in response to an inquiry from Miss Kelly Rueck, President, Association of Flight Attendants, to the Honorable Alexander P. Butterfield, Administrator, dated March 15, 1974. Copies of Miss Rueck's inquiry and the FAA's response are enclosed herewith.

As I understand Mr. McKay's letter, it was the FAA's position, taking into account both the requirements of aircraft operation and the duties of a required aircrew member during emergency situations, that pregnancy is not *per se* a medical disqualification for a required aircrew member. Rather, the ability of a pregnant woman to perform her duties—whether

"normal" duties or those related to the emergency evacuation of an aircraft—must be determined on an individual basis. The letter thus suggests that pregnancy is not *per se* a limiting condition which would disqualify a woman from serving as a flight attendant under 14 C.F.R. § 91.215(b), and that an airline's continued employment of female flight attendants while pregnant is not inconsistent with the carrier's responsibility for public safety under the Federal Aviation Act.

I request your advice as to whether Mr. McKay's letter remains an appropriate statement of the FAA's opinion regarding the ability of required aircrew members and flight attendants to continue flying during the term of a pregnancy.

I would appreciate your prompt attention to this request. If there are any aspects of the above which require clarification, please contact me at your earliest convenience.

Very truly yours,

/s/ Donald B. Meyers
DONALD B. MYERS

DBM/cgd

Enclosures

Feb. 2, 1977

Mr. Donald B. Myers
Debrevoise & Liberman
700 Shoreham Building
806 15th Street, N.W.
Washington, D.C. 20005

Dear Mr. Myers:

This is in reply to your letter of December 28 concerning the ability of aircrew members and flight attendants to continue flying during pregnancy.

As you point out, this matter was addressed in Mr. Kay's letter dated March 28, 1974. We have reviewed Mr. McKay's letter and can state that it remains an appropriate explanation of the agency's position regarding pregnancy and flying.

We reaffirm Mr. McKay's statements that the Federal Aviation Administration has not established limits for crewmembers because of pregnancy, and we feel that a pregnant woman with no complications is in good health. The consideration of whether a flight attendant should fly when pregnant continues to be a matter between herself, her doctor and her employer. When serving as a required crewmember, however, a flight attendant must be able to perform all assigned tasks.

We trust this answers your question, and if we may be of further assistance, please let us know.

Sincerely,

Original Signed By
H. L. Reighard, M.D.

H. L. REIGHARD, M.D.
Federal Air Surgeon, AAM-1

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